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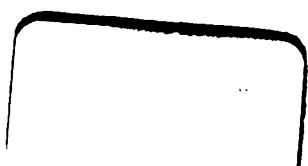
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillaspie

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, Esqrs.,

Now Reprinted in Full.

VOL. XIX.

CONTAINING CASES DECIDED IN THE KING'S BENCH, COMMON PLEAS, AND
ON THE CIRCUITS, FROM TRINITY TERM, 1829, TO TRINITY TERM, 1831.

BOTH INCLUSIVE.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS
AND
OTHER COURTS.

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE ESQ., BARRISTER-AT-LAW.

VOL. VI.

FROM TRINITY TERM, 10 GEO. IV. 1829, TO TRINITY TERM, 11 GEO. IV. 1830.
BOTH INCLUSIVE.

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JUDGES
OF THE
COURT OF COMMON PLEAS,
DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir WILLIAM DRAPER BEST, Knt., Ld. Ch. J.

**The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt.,
Ld. Ch. J.**

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

Hon. Sir JOHN BERNARD BOSANQUET, Knt.

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,

IN
Trinity Term,
AND THE VACATION PRECEDING,
IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

Phillips
IN THE HOUSE OF LORDS.

FOX v. The Bishop of CHESTER. June 3.

(In Error.)

The sale of a rect presentation, the incumbent being in *extremis*, within the knowledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony.

THIS was a writ of error, brought by the plaintiff below, from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the court of great sessions at Chester, on a special verdict in a *quare impedit* commenced in the latter court.

*2] The first count of the declaration stated that the advowson of the rectory of the church of Wilmslow was appurtenant to the manor of Bollyn; and set out the title of Thomas J. Trafford for life thereto: That T. J. Trafford, by indenture, dated 12th November, 1819, granted unto the plaintiff, his executors, &c., the advowson of the rectory and parish church of Wilmslow, for ninety-nine years, if the grantor should so long live. Averment, that grantor was still living, and that the church became vacant by the death of the last incumbent, whereby it belonged to the plaintiff to present, but the defendant hindered him from so doing.

There was a second count, setting out a title to the advowson in gross, and omitting all mention of the manor; in all other respects it was similar to the first.

The defendant cravedoyer of the issue made between the plaintiff and

Trafford, whereby it was witnessed, that in consideration of 6000*l.* paid to Trafford by the plaintiff, the former had granted, bargained, sold, and demised, and by the said indenture did grant, &c., all that the advowson, donation, right of patronage, presentation, and free disposition of, in, and to, the rectory and parish church of Wilslow, with the rights, members, and appurtenances thereunto belonging; *habendum*, for ninety-nine years, if Trafford should so long live. With a proviso that when and so soon as he the said Edward Vigor Fox, his executors, &c., should have presented to the said rectory or church of Wilslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion, or cession of J. Bradshaw the incumbent, or otherwise, or through the wilful neglect or default of him the said Edward Vigor Fox, his executors, &c., the said rectory or church should have been suffered, as to the presentation or right of presentation thereto to lapse, he the said Edward Vigor Fox, his executors, &c., should and *would at any time or times thereafter at the request and proper costs and charges of the said [*3 Thomas Joseph Trafford, or such person as he should appoint, re-assign the said advowson to him the said Thomas Joseph Trafford, or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances by the said Edward Vigor Fox, his executors, &c. He then craved oyer of the indenture in the second count mentioned, which was declared to be in the same words as the indenture in the first count, and therefore not set out on the record.

He then pleaded fifteen pleas, among which the fourth, the plea chiefly relied on, averred that the said church of Wilslow is within the diocese of Chester, and a benefice with cure of souls, and that whilst the said Thomas Joseph Trafford was so seised of the said manor and of the said advowson and before the making of the corrupt simoniacal and unlawful agreement in this plea aftermentioned, to wit, on the 11th day of November, in the year of our Lord 1819, the said J. Bradshaw then being the incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then dispaired of, whereof, as well the said Edward Vigor Fox and Thomas Joseph Trafford as one George Uppleby, clerk, in that plea aftermentioned, to wit, on, &c., and also at the time of making the corrupt, simoniacal, and unlawful agreement in that plea aftermentioned, there had notice; that whilst the said Thomas Joseph Trafford was so seised of the said manor to which, &c., with the appurtenances, &c., and of the said advowson as aforesaid, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state, and condition as aforesaid, to wit, on, &c., at, &c., they *the said T. J. Trafford, [*4 Edward Vigor Fox, and George Uppleby, and each of them then and there, well knowing the premises, and believing and expecting that the death of the said J. Bradshaw of the mortal disease aforesaid, was then and there fast approaching, and that, by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said Thomas Joseph Trafford and the said Edward Vigor Fox, with the knowledge of the said George Uppleby, that the said Edward Vigor Fox should pay to the said Thomas Joseph Trafford a sum of money, to wit, the sum of 6000*l.*, and that the said Thomas Joseph Trafford, in consideration thereof, should grant, bargain, and sell to the said Edward Vigor Fox the next presentation to the said church; and that, in order to make such grant, bargain, and sale, and as a means of making such grant, bargain, and sale to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance, and device, to evade and elude the making such grant, bargain, and sale, as a mere grant, bargain, and sale to the said Edward Vigor Fox, of the next presentation to the said church in express terms, the said indenture in the said declaration mentioned to have been made between the said Thomas Joseph Trafford and the said Edward Vigor

Fox should be made, and that the said Thomas Joseph Trafford should seal, and as his act and deed deliver the said indenture: that afterwards, and whilst the said J. Bradshaw, so being the incumbent of, and filling the said church as aforesaid, was so afflicted and in such danger, state, and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord 1819, to wit, at, &c., in pursuance, furtherance, and performance of the said corrupt, simoniacal, and
 *5] *unlawful agreement, and in order to make such grant, bargain, and sale of the next presentation to the said church, and as a means of making such grant, bargain, and sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance, and device, to evade and elude the making such grant, bargain, and sale, as a mere grant, bargain, and sale to the said Edward Vigor Fox, of the next presentation to the said church, in express terms, the said indenture, in the said declaration mentioned to have been made between the said Thomas Joseph Trafford and the said Edward Vigor Fox, was made, and the said T. J. Trafford did then and there seal, and as his act and deed deliver the said indenture: that the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, remained and continued so afflicted as aforesaid, and in such danger, state, and condition as aforesaid from time to time in that respect in this plea above mentioned until the time of his death, and that afterwards, to wit, on the 12th day of November, 1819, Bradshaw so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid died, to wit, at, &c., and by means thereof the said church then and there became and was vacant: that, by reason of the premises and by force of the statute in such case made and provided, the said last-mentioned indenture became, and was, and is utterly void, frustrate, and of no effect in law, and wholly inoperative to grant, pass, or convey any estate, right, title, or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said E. V. Fox: that afterwards, to wit, on the 30th day of December, 1819, at, &c., the said E. V. Fox, under colour, and by pretence and means of the said last-mentioned indenture so made as aforesaid, in pursuance of the said corrupt, simoniacal, and*
 *6] *unlawful agreement, did corruptly, simoniacally, and unlawfully, and against the form of the statute in such case made and provided, present the said George Uppleby clerk to the said bishop, to be admitted, instituted, and inducted into the said church of Wilmslow, to wit, at, &c.: that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said George Uppleby by the said E. V. Fox, so made as aforesaid, became, and was, and is utterly void, frustrate, and of no effect in law.*

The fifth plea was like the fourth, omitting the parts in *italics*; and,

The sixth plea varied from the fourth only by omitting to state the privity of Uppleby.

The replication to the fourth plea took issue, that it was not corruptly, &c., agreed by and between the plaintiff and Trafford, with the knowledge of Uppleby, as in that plea alleged. By a similar replication to the fifth plea, and to each of the other pleas, it was denied that it was corruptly, &c., agreed, as in those pleas alleged.

The jury found by a special verdict that before and on the 12th day of November, in the year of our Lord 1819, the said Thomas Joseph Trafford was seised of the manor and advowson within mentioned, and that before and on the said 12th day of November, in the said year of our Lord 1819, the within-named Joseph Bradshaw was the incumbent of the within-named church, in the pleadings within mentioned, and that the said church was then full of the said Joseph Bradshaw: that the said Joseph Bradshaw, so then being such incumbent of, and filling the said church as aforesaid, was, before and upon the said 12th day of November, in the said year of our Lord 1819, afflicted with a mortal disease,
 *7] *so that he was then in extreme danger of his life, and his life was thereby then greatly *despaired of; and that he was and continued so afflicted with*

such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death, and that the said Joseph Bradshaw so being such incumbent as aforesaid, died of the said mortal disease, on the said 12th day of November, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of November: that on the said 12th day of November, in the said year of our Lord 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said Joseph Bradshaw was such incumbent as aforesaid, an agreement was made and concluded, between the said Thomas Joseph Trafford, so being seised of the said manor and advowson as aforesaid, and the said Edward Vigor Fox for the sale, by the said Thomas Joseph Trafford to the said Edward Vigor Fox, of the next turn or presentation of the said church, for and in consideration of 6000*l.* of lawful money of Great Britain: that on the said 12th day of November, in the said year of our Lord 1819, and immediately after the making of such agreement they, the said Thomas Joseph Trafford and Edward Vigor Fox, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned indenture, bearing date the 12th day of November, in the said year of our Lord 1819; and that the said agreement was made, and the said indenture was sealed and delivered in the lifetime of the said Joseph Bradshaw: that the said Joseph Bradshaw at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of: *that the said Thomas Joseph Trafford [*8 and the said Edward Vigor Fox, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, well knew and believed that the said Joseph Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of: that the said agreement was made and concluded, and the said indenture was sealed and delivered without any knowledge or privity whatsoever of the said George Uppleby, and without any intention to present the said George Uppleby to the said church when it should become vacant.

Upon the argument on this special verdict, which took place in June, 1822, the court of great sessions at Chester were divided in opinion; but in order to carry the cause up to a higher tribunal, the judgment was entered for the defendant by consent.

On a writ of error to the Court of King's Bench, the judgment of the court below was affirmed in Hilary term 1824; and the present writ of error was brought to reverse both judgments.

The question raised by this special verdict was, whether the sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity of, or a view to the nomination of the particular clerk, be alone, without other circumstances, void, on the ground of simony.

The statute of 31 Eliz. c. 6, s. 5, enacts, "And for the avoiding of *simony and corruption*, in *presentations*, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions, to the same, be it further enacted by the authority aforesaid, That if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days *next after the end of [*9 this session of parliament, for any sum of money, reward, gift, profit, or benefit, *directly or indirectly*, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurances, of or for any sum of money, reward, gift, profit, or benefit, whatsoever, *directly or indirectly, present or collate any person to any benefice* with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; That then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction, thereupon, shall be

utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the queen's majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living, ecclesiastical, for that one time or turn only; and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical, and the person so corruptly taking, procuring, seeking, or accepting, any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical."

The case was argued by *Cross*, Serjt., for the plaintiff in error, and by the *Solicitor-General*, for the defendant in error. The reasons adduced on the part of the plaintiff in error, for reversing the judgment of the court below, were as follows.

*10] That by the law of England, the patronage or the *right of presenting to a benefice is a property or estate capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, incapable of being conveyed, *Baker v. Rogers*, Cro. Eliz. 789, *Stephens v. Wall*, Dyer, 282 b., *Brookesby v. Wickham*, 1 Leon. 167, because it is like the rent of an estate become in arrear, which is a chose in action, and cannot be assigned. But the church is full as long as the incumbent is alive; and is equally so whilst he is in his last sickness, as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common nor statute law imposes any restriction in this respect on lay patrons. (a)

It is the exercise only of the right of presenting by the patron for the time being, which is a public trust, and as such controlled by law: which sufficiently guards the interest of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute 31 Eliz. c. 6, and from this statute only: and the question turns entirely upon the construction to be put upon its provisions. It is a penal statute, and it creates forfeitures; and therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

This statute avoids the presentation which the patron for the time being makes, for any money, reward, gift, profit, or benefit, arising directly or indirectly; or for any promise of such reward, directly or indirectly. It *11] is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

In the present case, Mr. Fox the plaintiff in error was the patron at the time of the actual vacancy, and he selected the clerk, without any communication with Mr. Trafford; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the act, it must be conceded, as it was in the courts below, that Mr. Trafford was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the plaintiff in error as the mere instrument to carry such presentation into effect. But there is nothing in the finding of the jury to warrant such a conclusion.

It is admitted, that the grant of a next presentation during the life of an incumbent may be void, on the ground of simony; but that is where the contract is really simoniacal; a contract for the presentation by the patron of a particular clerk, for money, and the conveyance of the next presentation is a contrivance or instru-

ment to carry it into effect. This will be illustrated by the case of Winchcombe and Pulleston, Noy, 25, Hobart, 165, 1 Brownl. & Golds. 164, the leading case on the subject: the pleadings in Winch's Entries, 887, fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of 90*l.* to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant, and to assure such presentation he should *grant the next avoidance [*12 to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was a clear simoniacal contract; and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of Closse v. Pomcoyes, cited Lane, 73, is nearly to the same effect; and is another instance of a contrivance to carry into effect a simoniacal contract.

If the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is a presentation by the existing patron, of the clerk, for reward; it is a question for the jury whether each transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury, if there appear on the face of an instrument a loan, and a reservation of illegal interest, the court can give judgment against its validity, but if the transaction does not appear on the face of it, *Yeoman v. Barstow*, Lutw. 273, *Kitchen v. Calvert*, Lane, 100, necessarily to be usurious, it is a question of fact for the jury, and whether it be a shift or contrivance or not. In both the cases, the really simoniacal or usurious contract ought to be shown by a special plea when a special plea is required: and in cases found by the jury.

The defendant has not pleaded in this case, and the jury have not found that there was any corrupt or simoniacal contract, that Trafford should present the clerk; and that the grant of the next presentation was a mere contrivance to carry it into effect.

*In the absence of such a finding, the court cannot make any presumption against the validity of the grant. Simony as well as fraud is not to be [*13 presumed, but found.

But if it were competent for the court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

If it had been found that money was to have been given to Trafford, if Uppleby should be presented, or that it was the purpose or even intent of the plaintiff to have presented Uppleby, it might have been argued that the grant was made for that purpose, and if so, the grant may possibly be said to be an instrument to carry into effect the particular appointment; and the clerk may possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument, and the appointment, made virtually by the old patron, is an appointment made for reward. But if there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he pleases, and if he select any clerk, without reward, he is not within either the letter or spirit of the act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with and the new patron purchases the right of selection, by means of the grant, and that right is fairly and properly exercised.

The judgment of the court of King's Bench (2 Barn. & Cress. 658), proceeds in a great degree upon the ground that courts have a right to consider what is an evasion of a statute, a power which it is humbly conceived does not apply at least to the case of a penal statute creating forfeitures, *and if allowed to be [*14 exercised, would lead to great doubt and uncertainty in the law.

Upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in Winch, 63, *Sheldon v. Bret*, excepted, in which mention is made of its hav-

ing been so adjudged in Chancery, but under what circumstances does not appear; it may have been so adjudged on the special facts.

On the other hand, there is a solemn decision of the Court, *Barret v. Glubb*, 2 Black. 1052, that by the grant of an advowson, when the incumbent was on his death-bed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of next presentation, when united with all other future presentations, was not void, the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

The argument for the defendant in error was in substance as follows:—

1st. Simony was an offence by the common law of the land, antecedently to the statute of 31 Eliz. c. 6; and the transaction, as stated upon the record, was a corrupt and simoniacal contract for the sale of the next turn or presentation, under the special circumstances of the case: 1 Institute, 17 B; 3 Institute, 156; *Mackaller v. Todderick*, Cro. Car. 361; *Wincheomb v. Pulleston*, Hob. 167; *Bartlett v. Vinor*, Carth. 252.

*15] 2dly. The presentation in the present case, was *substantially a presentation by Mr. Trafford the seller, and was by him a presentation for money.

3dly. The transaction in question was a shift and contrivance to evade the provisions of the statute of the 31 Eliz. c. 6.

4thly. It was a presentation by Mr. Trafford, for money, of such clerk as Mr. Fox might nominate; and a contract to such effect is simoniacal, though it may have passed without the privity of the clerk, who may afterwards happen to be presented; the privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in *Doctor Hutchinson's case*, 12 Rep. 100; and in the case of *Baker v. Rogers*, Cro. Eliz. 788.

5thly. By law no grant can be made of the next presentation, when the church is empty, *Brookesby's case*, Cro. Eliz. 174, S. C. 1 Leon. 167, 3 Leon. 256, *Dyer*, 282; of which rule, though it has been sometimes said that the reason is, that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that is severed from the advowson, and would pass to the executor; the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord Mansfield, Chief Justice, and Mr. Justice Wilmot, in the *Bishop of Lincoln v. Wolferston*, 3 Burr. 1504, and the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality.

6thly. The law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and piety, and the preventing of scandal to religion, and prejudice to the church, by preferments either of improper persons, or from corrupt motives, will not *endure the danger which would
*16] arise from the sale of the right of presentation, when the incumbent is at the point of death, where the contracting parties know that fact, and where the contract is made with a view to and upon the terms of an immediate presentation.

7thly. There is no mischief intended to be guarded against by the rule of law prohibiting the sale of the next presentation, when the church is empty, which might not be equally incurred, if such presentation could be sold when the incumbent is on his death-bed, and known to be so both to the buyer and to the seller.

8thly. The statute 31 Eliz. c. 6, ought to receive a liberal construction, in order to reach the evil for the remedy of which it was passed, and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy and evasion of the provisions of the statute.

Lastly. In *Sheldon v. Bret* it was expressly decided, that a grant of the next

turn for money was simoniacal, when the parson was sick in his bed, and ready to die.

On this day the opinion of the Judges of the Courts of Common Pleas and Exchequer was delivered as follows by

BEST, C. J. My Lords, the question which Your Lordships have been pleased to put to the Judges in this case is, "Whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error." The Judges who heard the argument at Your Lordships' bar are unanimously of opinion, that upon the whole matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend *Joseph Bradshaw, was by law vested in Edward Vigor Fox, [*17 the plaintiff in error.

The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed them to the manors in which the churches were situate. By the grant of a manor, the advowson appendant to it passes to the grantee; many of these advowsons have since been severed from the manors to which they were appendant. Although advowsons, when *in gross*, as these which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord Kenyon and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances. If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold. Undoubtedly much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the courts of law have never thought that they were authorized to go this length; and even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the legislature to prevent such purchases. A clergyman might buy a next presentation, and present himself, before the passing of the statute of the 12 Ann. c. 12. The preamble to the second section of that *statute states that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings." And [*18 then the section provides, that if any one shall either directly or indirectly take or procure the next avoidance for money, reward, gift, profit, or benefit, or shall be presented or collated (which words limit the operation of the act to clergymen), that it shall be deemed simoniacal.

It seems to me, that if the terms of the statute of Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself might have been reached without any other act of parliament. If such a case as that were not within the statute of Elizabeth, the case, on which Your Lordships have desired our opinion, cannot be affected by that statute. The church, in the present case, was full; no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. But I would observe, that persons have recovered who appeared to be dying. The special verdict only states, that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life; and his life was thereby greatly despaired of; and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the sale was completed. Many who are afflicted with mor-

tal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time; and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

*19] If this conveyance was void, it must have been void at the time it was executed, and would remain void into whatever hands and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person, ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void; and yet this would be the necessary consequence of a decision that the sale was simoniacal. Whilst the law permits the next presentations of livings to be sold during the lives of the incumbents, as long as the incumbent is alive the sale is good. Every one who purchases a next presentation contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent, and the prospect of using the presentation, may be contemplated, the time when the death is to happen cannot be material.

This case has been compared by the counsel for the defendant in error to those of contemplation of bankruptcy. But a party is not permitted to do an act in contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy, was, before the 6 G. 4, void. By that act such a transfer or payment is an act of bankruptcy, because such transactions are direct, frauds on the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and, probably, to much false *swearing, and would keep churches for a long time void.

*20] The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory inquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree. I submit to your Lordships, that the most convenient rule is that which I conceive the law has already established, namely, that the right to sell the presentation continues as long as the incumbent is in existence.

The judgment of the Court below is, according to the words of the Chief Justice, "founded on the language of the 31 Eliz. c. 6, and the well-known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance." The words of the fifth section of the act are, "If any person shall, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration." This clause applies only to the person presenting to the living. If he has received no reward or promise of reward, the presentation is not affected by the terms of the act. The plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward for the plaintiff in error, and was to account to him for it—if the plaintiff in error

*21] was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shown by the pleadings, and found by the jury. All that appears on this record is, that the plaintiff in error bought the next avoidance of a living

that was full; and *tax*, without any corrupt consideration, he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shows this is a fraud on the act, unless it be a fraud on the act to buy the presentation to a living which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day with this expectation.

There is no legal authority to support the judgment of the Court, except a short and loose note in Winch's Reports of Hutton, saying what used to be done in Chancery; on the other hand, the case of *Barrett v. Glubb* is directly opposed to the judgment of the Court of King's Bench. It was thought that case had not the weight of a judicial decision because it was not acted upon. But it was acted upon. Lord Bathurst decreed the conveyance of the advowson which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*; and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it by bill of exceptions to the King's Bench. When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign; there was, therefore, no occasion for any injunction, as was supposed by the *King's Bench. The question, by [*22 the conveyance decreed, was fairly raised for another court of law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases in the books which bear much on the question proposed to us by your Lordships. For the reasons given in support of the Judges' answer to that question I only am responsible.

Earl of ELDON. My Lords, I will trouble your Lordships with a very few words on this case, which involves questions, certainly, of very considerable importance. A case upon the same subject was decided by the Court of Common Pleas many years ago: and the manner in which that case was decided in the Court of Common Pleas was of very great importance, first, because it was decided by most learned Judges; and, secondly, because it was a case in which a court of equity sent the case for the opinion of that court, in order to enable that court of equity to decide what it should do in equity. The case was this: there had been the purchase of an advowson, the incumbent being at the time in such a state that he died within two days afterwards. I believe, indeed, the period was very nearly the same, if not exactly the same, as in the present case. Your Lordships will recollect it was one circumstance in that case, that the intended purchaser of the estate stated that there must be no delay, but that the contract should be immediately completed. The Court at that time was filled by Lord Chief Justice De Grey, a very eminent Judge, Mr. Justice Blackstone, and by two other Judges. The case was sent by Lord Bathurst for the opinion of the Court of Common Pleas, for the purpose of enabling the Lord Chancellor to determine whether the mere contract should be carried into execution by an actual conveyance. Now, that being the *nature of the [*23 case, and that being a case in equity, makes it a much stronger case than if the court of equity had not taken that course, because your Lordships will recollect that, with respect to many cases of contracts which come before courts of equity, the parties resort to a court of equity because it is conceived there are grounds upon which a court of equity will grant its interposition to carry into effect that contract. In that case the controversy was, whether, supposing that contract to be good in law, the party ought not to be left to his remedy at law instead of coming into equity for a specific performance of the contract; however, the Chancellor of that day thought fit to take the opinion of the Court of Common Pleas upon the question, whether the advowson being sold at such a period, nearly approaching to the death of the clergyman, the presentation as well as the advowson being included in the conveyance, carried with

it the assignment of the presentation; and, my Lords, the Court of Common Pleas were of opinion that it did, and so they certified to the Court of Chancery. I observe in the proceedings in this case in the court below, the Court seems not to have been fully informed by the counsel at the bar; and I may take the liberty of saying so, because I see two Judges of that Court who now concur in the opinion that this was a good conveyance, and who then thought it was not a good one. The Court, my Lords, seem to me to have been not specifically informed as to what was the fact. We have heard it stated at the bar, that an injunction had been granted by the Lord Chancellor against the proceedings in the *quare impedit*; and that, after that opinion of the Court of Common Pleas was communicated to his Lordship, he did not continue the injunction. Now, my Lords, that circumstance is really of no weight. It was quite unnecessary *24] to continue the injunction, because the moment it was intimated that in *the opinion of the Court of Common Law, the contract was a good contract to be carried into execution, it was not necessary to take the trouble of asking for the injunction being continued, for the conveyance was immediately executed which carried the contract into execution; and that conveyance having been executed, it would be a good conveyance of the presentation, as well as of the advowson. The conveyance being a good conveyance of the presentation, being declared by the Court of Chancery to be a good equitable conveyance of the presentation, and the Lord Chancellor proceeding on the opinion of the Court of Common Pleas, there was an end of all question. Now, my Lords, regarding the effect of this decision on human transactions, seeing that in all probability many transactions have taken place upon the footing of it, it does appear to me, I confess, very undesirable that that decision should be shaken by the courts of law. I confess I had much rather see an act of parliament than see a further extension of that doctrine of which we have heard in the argument at the bar; and I am very happy to take the opportunity of stating to your Lordships that I most fully concur in the opinion which has been expressed by the learned Judges.

The LORD CHANCELLOR. Is it your Lordships' pleasure this judgment be reversed? Judgment reversed.

*25]

*IN THE HOUSE OF LORDS.

HARDING v. POLLOCK and Another.

The appointment to the office of clerk of the peace is in the *custos rotulorum* of each county, and King's county, in Ireland, is not an exception. *Bayley, J., diss.*

THIS was a writ of error from the judgment of the Court of Exchequer Chamber in Ireland, affirming the judgment of the Court of Common Pleas in Ireland in this cause.

Henry Harding (the plaintiff in error) claimed the office of clerk of the peace for the King's County, and had been several years in possession of it, under an appointment by the *Custos Rotulorum* of the county: John Pollock and Arthur Hill Cornwallis Pollock (the defendants in error) claimed the same office under letters patent from the crown; and the action, which was for money had and received to their use, was brought by them in the Court of Common Pleas in Ireland, to ascertain whether the right to make such appointment for that county was in the crown, or in the *custos rotulorum*.

The defendant below pleaded two pleas, first, the general issue; and, secondly, the statute of limitations, in both of which issue was joined; but as the plaintiffs below, desiring merely to establish their right, sought only nominal damages, no question arose on the second plea, the object of which merely was to cover the profits received more than six years before the commencement of the action. The case was tried before Lord Norbury, the Chief Justice of the Court, at the

sittings after Michaelmas term 1819, the venue being laid in the county of the city of Dublin. At that trial a special verdict was found, stating in substance as follows:—"That his late Majesty, King George the Third, by *letters patent under the great seal of Ireland, dated 30th July 1798, granted to the said John Pollock and Arthur Hill Cornwallis Pollock (the defendants in error) the office of clerk of the peace within and throughout the province of Leinster, in Ireland, and within every county thereof, except Kilkenny, to hold for their lives, and the life of the survivor of them; which letters patent were duly enrolled in the Rolls office, on the 4th of August 1798, and were duly accepted by the said John Pollock and Arthur Hill Cornwallis Pollock, and that they are fit and proper persons to hold the said office; and that, by virtue of said patent, they duly obtained possession of said office in the King's County, and exercised the duties thereof by them, and their sufficient deputies, until the year 1800.—That the King's County is in the province of Leinster, and is one of the counties thereof; and that by an act of parliament in Ireland, of the third and fourth of Philip and Mary, and in the year of our Lord 1556, it was enacted, that the king and queen, and her successors, should be entitled to the counties of Leix, Slievemarge, Irry, Glinmaliry, and Offally, and that for making them shire grounds, a certain portion of the said counties should from thenceforth be a shire or county, by the name of the King's County, and that the residue should be a county by the name of the Queen's County.—That from the said year 1556 (at which time it appears by said act of parliament the lands comprised within the said King's County were first made a shire by the name of the King's County) the kings and queens of Ireland have nominated and appointed, and been used and accustomed to nominate and appoint, fit persons to fill the said office of clerk of the peace for the King's County to the said year 1798; and that the custodes rotulorum of the said county have appointed persons to fill said office in the said county, from the year 1760 to the present time, who have held *and [*27 enjoyed the said office accordingly, and received the emoluments thereof, with the exception of Hugh and Andrew Carmichael appointed by the crown, and of one James Cowly, the deputy of the said John Pollock, who were severally in possession under the crown. The special verdict then stated, letters patent of his late Majesty, bearing date October 30th, 1766, and duly enrolled, by which the Earl of Drogheda was appointed custos rotulorum of said county during his Majesty's pleasure; and then set out a writing, under hand and seal, whereby the said Lord Drogheda, in 1772, appointed Edward Moore Dowden, clerk of the peace, and deputy custos rotulorum of the said county, during the pleasure of said Earl. It found, that said Dowden took upon himself the execution of the duties of the said office, and executed the duties, and received the emoluments thereof, until his death in 1789. And then set out an appointment of the said Henry Harding (the plaintiff in error) in said year to said office, by said Lord Drogheda, under hand and seal, during good behaviour. It then found that said Harding was and is a proper person to hold the said office, and did all things necessary to qualify him to hold the said office, and to make him a complete clerk of the peace, and was admitted to the said office, and took on him the duties thereof, and has continued from thence to the present time to execute the duties, and receive the emoluments thereof, without interruption by any person, and conducted himself properly therein; that said Lord Drogheda is still (at the time of finding said verdict) custos rotulorum of said county. And that within the last six years the defendant received fees and emoluments of the said office to the amount of one shilling."

On this special verdict, the Court of Common Pleas in Ireland, in Trinity term 1821, after a full argument, gave *judgment unanimously in favour of the said John Pollock and Arthur Hill Cornwallis Pollock, the plaintiffs [*28 in said action.

From this judgment, Henry Harding, the defendant in said action, brought a writ of error, returnable into the Court of Exchequer Chamber in Ireland, where he has assigned the general error only.

The case was fully argued in that Court, which, in June 1823, affirmed the said judgment of the Court of Common Pleas, two of the Judges dissenting; whereupon the original defendant brought his writ of error returnable into parliament, where he again assigned the general error.

The case was argued in parliament by *Campbell* for the plaintiff in error, and the *Solicitor-General* for the defendants in error.

For the plaintiff in error it was submitted, that the judgment of the Court of Exchequer Chamber ought to be reversed *in toto*, and judgment given for the plaintiff in error.

First, because it did not appear that the defendants in error were ever admitted to the office in question: secondly, because by the law of the land the *custos rotulorum* had the right to appoint to the office of clerk of the peace: and thirdly, because by the usage, as appearing on the special verdict, the plaintiff in error had obtained a legal right to retain the office under the appointment of the *custos rotulorum*.

It was further submitted, that this special verdict was so imperfect that no judgment for the defendants in error could be given upon it; but, that, in case judgment should not be given for the plaintiffs in error, a *venire de novo* must be awarded, first, because the question of the admission of the defendants in *29] error was doubtful; and, secondly, because there was sufficient *evidence of usage to entitle the plaintiff in error to a verdict, or which ought to have been left to a jury to determine.

For the defendants in error it was contended, that the county in question in this case having been made a county and brought within the pale of British law so late as the year 1556, prescription could not exist as to any of its offices or establishments; and that in the absence of prescription the appointment of all officers judicial, ministerial, or executive, concerned in the administration of public justice, belonged to the crown of common right, and was part of the prerogative.

Upon this argument the following questions were proposed for the opinions of the judges:—

First, Whether the appointment to the office of the clerk of the peace within the shires of England did, by law, previously to the passing of the act of 37 Hen. 8, c. 1, belong of right to the crown or to the *custos rotulorum* of the shire by virtue of his said office, or to any and what other person or persons?

Secondly, Whether the appointment to the office of the clerk of the peace within the shires of Ireland, did, by law, in and previously to the year 1800, belong of right to the crown or to the *custos rotulorum* of the said shire by virtue of his said office, or to any and what other person or persons?

Thirdly, Whether the right to appoint to the office of the clerk of the peace within the King's County in Ireland, did, by law, in and previously to the year 1800, belong to the crown or to the *custos rotulorum* of the said shire by his said office, or to any and what other person or persons?

The authorities on either side are so fully considered in the opinions of four of the learned judges, that it has been deemed improper to print the argument of counsel.

*BAYLEY, J. My lords, I regret extremely that I cannot bring myself *30] to concur in the opinion the other judges have formed in this case.

The first question proposed by your lordships to our consideration is this, Whether the appointment to the office of clerk of the peace within the shires of England did, by law, previously to the passing of the act of 37 H. 8, c. 1, belong to the crown or to the *custos rotulorum* of the shire by virtue of his said office, or to any, and what other person or persons? I consider it to have belonged to the crown if the crown reserved it to itself: that it belonged to any other person or persons (at least if named in the commissions of the peace) upon whom the crown chose to confer it, if the crown thought fit to give it away: or that if the crown did not think fit to reserve or confer it, it belonged of right to the justices at large in quarter sessions assembled. Your lordships' question appears to me

to propose, as a mere point of law, to whom by law the right belonged, and my answer is framed upon that view of the question. I do not say, therefore, that the crown did not in fact confer this right upon the *custos rotulorum*; all I say is, that, unless it did so confer it, the *custos* has it not.

The courts of sessions of the peace originated, I apprehend, in the reign of Ed. 3, and were founded upon commissions issued in pursuance either of 18 Ed. 3, s. 2, c. 1, or of 34 Ed. 3, c. 1. The former of those statutes provides that two or three of the best reputation in the counties shall be assigned keepers of the peace by the king's commission; and, at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties.

The 34 Ed. 3, c. 1, directs, that in every county in England shall be assigned for *keeping of the peace, one lord (*un seigneur*), and with him three or [*31 four of the most worthy in the county, with some learned in the law, with power to hear and determine, at the king's suit, all manner of trespasses done in the same county. Both these statutes are silent as to the offices and the constitution of the court; then, as it seems to me, a question of law arises, What could legally be done? and, secondly, a question of fact, What was done? Where the crown erects a court of justice of its own authority, it may, I apprehend, fix and nominate what officers it shall have, and how their successors shall be appointed; and, I take it, it has the same power where it creates a court of justice under the direction of parliament, unless there be something in the act of parliament from which a contrary intention in the legislature may be collected: the legal presumption appears to me to be that the legislature will break in as little as possible with the prerogative of the crown, and that what it does not by express words or by necessary implication, take away, it leaves in the crown. Upon the establishment of this court, therefore, the crown might, if it thought fit, appoint one of the justices to be *custos rotulorum*, or it might omit it; it might name a clerk of the peace, or reserve to itself the future right of nominating the successors; or it might omit to name him, and be silent as to the office; and then the sessions would have had the right, as incident to their being a court, to decide upon having such an office: and the right to appoint him would be either in the sessions, if the crown made no other provision as to the appointment of officers, or in such other person or persons on whom the crown had conferred the right.

And whatever the crown might do in the first instance, would either be variable upon future occasions or not: in the former case the crown might resume to itself the right when it thought fit; in the latter, the nomination *and [*32 appointment could not have belonged to the *custos rotulorum*, unless he had been appointed *ab initio*.

Lambard, in his *Eirenarchia*, intimates that there was extant in his time one of the commissions granted in the 35 Ed. 3; and if we could discover the commissions granted at that time, and could be satisfied the commissions for the different counties were uniform and all of the same tenor, they might throw great light upon the question as a question of fact, though they could not be admitted in argument upon the question of law. Suppose those commissions to have been silent as to the *custos*, and to have reserved to the crown the right of appointing a clerk to the justices; can there be a doubt but that such right would have been well reserved? Suppose the commissions to have nominated a *custos*, and to have given him the power *pro hac vice* to have nominated the clerk of the peace, would not that have been a valid gift? and would it have been valid for more than that term? Would it not equally have been valid had the nomination been given to the justices at large, though it had appointed one in particular to be *custos rotulorum*? Suppose it to have nominated no *custos*, and to have been silent as to the clerk of the peace, would not the justices in sessions, that is the court, have had the power to nominate such clerk? Such power, according to Rolle's Abr. 526, is incident to every court. Suppose the commissions for different counties to have varied, or suppose them to have varied at different times, what would then have been the case? That they did vary at

to the county palatine of Lancaster, is clear from the exception in 1 W. & M. s. 1, c. 21, and from the modern practice; and that they varied as to other places, may be collected from the exception in 37 Hen. 8, c. 1, s. 5. In Durham, at present, the bishop is his own custos: the provisions in 37 Hen. 8, and also in *33] 3 & 4 Edw. 6, c. 1, s. 5, show he may make *another person so; but he appoints the clerk of the peace for the county without noticing his own character as custos rotulorum, and his grant of the office is confirmed by the Dean and Chapter of Durham. In Lancashire, Lord Derby is appointed custos rotulorum by the king under the seals of the duchy and county palatine of Lancaster, and Lord Clarendon is appointed clerk of the peace under the same seals; and, so far from any expression that he is to be deputy to the custos rotulorum, the custos rotulorum is distinctly enjoined to permit him to exercise his office without impediment, hindrance, molestation, interruption, or denial. And let me press upon your Lordships' consideration, the argument which arises from the practice in Lancashire and other privileged places. The statute 34 Ed. 3, applies to every county of England, Lancaster therefore is included, and what is the case in the other counties in England must be the case there. If the custos had *ex officio*, as matter of law, the right in every other county in England, before 37 Hen. 8, he must have had it there. If the king were precluded from nominating in ordinary counties, he must have been precluded there: if it would have been illegal elsewhere, it would have been equally so there. According to 4 Inst. 204, it was not till 50 Ed. 3, that he erected the county of Lancaster into a county palatine in parliament; the practice, therefore, even if it be confined to Lancashire alone, seems to establish the point that this is a question of fact, not matter of law. And what would your Lordships say, if the early commissions passed immediately after 34 Ed. 3 were before your eyes, and you were to find that many of them sanctioned the same practice as has prevailed in Lancashire: would this have no influence upon your judgment? Would it not, on the contrary, be the foundation on which you would act?

*34] My Lords, the argument that we are at liberty to *decide as matter of law, upon the right of the custos rotulorum to nominate, is founded on the recital in 37 Hen. 8, c. 1, on Lord Coke's Comment on the Statute of Westminster, 2, 2 Inst. 425; and on the opinion of Lord Chief Justice Holt in *Harcourt v. Fox*, 1 Show. 426, 506, 516; 4 Mod. 167; 12 Mod. 42; Show. Parl. Cas. 158. The recital in 37 Hen. 8, is, "that where before this time the Lord Chancellor hath, by reason of his office, the nomination and appointment of the custos rotulorum, and in like manner the custos rotulorum hath had until now of late the nomination and appointment of the clerk of the peace within the shire where he was custos rotulorum, and where now of late sundry persons not learned, nor meet, nor able for lack of knowledge to occupy the said offices of custos rotulorum and clerk of the peace, have gotten grants by the king's letters patent of the clerkship of the peace;" and it thereupon enacts that every custos shall nominate the clerk of the peace within his shire, and the custos and clerk of the peace shall execute the said offices by themselves and able deputy. This recital that the custos till of late hath had the nomination, may, as it seems to me, refer to the practice as matter of fact, without referring to the right as matter of law: the recital does not state, that of right he hath had, but states the fact only, that he has had; and the statute does not declare and enact, but enacts only; and it does not from beginning to end insinuate that the patents of the clerks of the peace were illegal or the grants void. On the contrary, it confirms the persons then in office in their respective offices; and if it were referring to the right as matter of law, it would, as it seems to me, go too far and mistake the right, as the right, unless there were something to show the contrary, would *35] be in the sessions, not in the custos. I admit Lord Holt's *opinion in *Harcourt v. Fox* is very strong, that the right of nominating the clerk of the peace belongs to the custos rotulorum of common right, by the common law of the land: but that was not the point in judgment; it was incidental only to the case under consideration; none of the other Judges concur with him; and

his conclusion is, "So that now having, as well as I can, given an account of the nature of the office of the custos, and the reasonableness of his not having the nomination of the clerk of the peace, I shall now give the particular reasons upon which I ground my judgment in this case."

My Lords, I am aware one of the main foundations for his opinion is, that the clerk of the peace must be trusted with the possession of the rolls to make entries upon, and that the custos rotulorum would be answerable to the king and to the subject in case of their loss, and that it would be the most unreasonable thing in the world that the custos rotulorum should be answerable for such miscarriage unless he had the appointment. But the answer to that argument is, that if the clerk of the peace has the possession of the rolls, not as deputy to the custos, but as the officer of the court, the custos would not be answerable to the king, or to the public, in case of their loss or destruction whilst they remained necessarily in the hands of the clerk of the peace; and as to the notion of unreasonableness, that objection has applied at all times as to the county palatine of Lancaster; and it has applied in every county in England since 1 W. & M., where a new custos rotulorum has been appointed in the lifetime of a preceding clerk of the peace; and applied to the very case they were then deciding: for the decision was, that the old clerk of the peace was entitled to continue though the custos who appointed him was removed, and a new custos appointed. Another argument he relies upon is drawn from the practice as to the clerk of assize and the county *clerk in Mitton's case, 4 Rep. 32, and the reasons given in 2 Inst. 425, for that practice; but both those offices [*36] are considered in 2 Inst. as having existed before the time of legal memory, and the crown may be excluded by time from interfering as to ancient offices, though it is not prevented from interfering as to offices created within time of legal memory. It may be observed, too, that Lord Holt speaks of the possession of the rolls by the custos as possession of them by all the justices (1 Show. 528); that he speaks of the clerk of the peace as the senior of the justices in court; and it may be of some service if I shortly notice how this matter was treated by the counsel in argument, and by the other judges, and if I call to your Lordship's observation how it was again treated when another opportunity occurred. Sir T. Powys argued that the custos was in the nomination of the Lord Keeper, and I think, as anciently, the nomination of the clerk of the peace in the custos. But the clerk of the peace is not the clerk of the custos, but of all the justices in general, and properly the clerk of the sessions. Mr. Hawles, who argued for the defendant, says that the statute of Ed. 3 makes no mention of such an office, but it was an incident. Justices would not make and draw out their own records, and in all probability he who is called in the statute of Ric. 2 their clerk, was appointed by the justices to do that work for them. He supposed that the clerk of the peace was at first the keeper of the records, but afterwards he that was most eminent for quality among the justices was appointed custos, and he appointed the clerk of the peace, his deputy or servant. Levins, who was for the plaintiff upon the second argument, says, "Should I go about to inquire into the origin of the office of custos, I should attempt *ambulare in tenebris*." As to the office of clerk *of the peace, he says, "I cannot say how it was before the statute of Hen. 8; before there were justices there were conservators, and it is likely they had their clerk to do their business and keep their records, and it is likely this officer was in imitation of that, but I cannot directly tell how things might be, for this matter is all *in nubibus*." Mr. Justice Eyre says (in substance), "We are, I confess, much in the dark as to the beginning of the office of clerk of the peace, but the statute of W. & M. takes him wholly out of the power of the custos, and subjects him to another jurisdiction, that is, to the sessions of the peace, to which he is properly an attendant." Mr. Justice Gregory notices that in 2 Hen. 7, fol. 1, he is called not only clerk of the peace, but *attornatus domini regis*; and that, says he, is a proper name of office for him, for he draws the issues upon traverses, and so acts as attorney in that court for the king. Mr. Justice Dolbin is silent as to these points; and it is therefore by Lord Chief Justice

Holt, and by him only, that they are principally discussed. These opinions were delivered in Trinity term, 5 W. & M. None of the other reporters of this case give the detailed account of Lord Holt's argument. Shower, in 4 Mod. 178, unites all the arguments of the Court, and puts it thus: As to the beginning of this office we are much in the dark, for we can only make probable conjectures about it; and as to his continuance in office, it is not to be collected out of any of the law books before 37 Hen. 8. It is plain it was not an office time immemorial, because the commission of the peace is not so. Afterwards it became necessary for one to make entries and join issues; the custos appointed a clerk for that purpose, who is now called clerk of the peace; and this seems very agreeable to the statute of Westminster 2d, by which it appears that such officers and clerks who are to enter and enrol the pleas were always appointed by the judge or chief *38] minister of the court. Comberbach, 210, only says the nomination of the clerk of the peace belonged to the custos as the most proper person: 2 Inst. 425. Within five years, namely, in Hilary term 8 & 9 W. 3, whilst the opinion of Lord Holt must have been within the recollection of every Judge in Westminster Hall, a question as to the office of clerk of the peace again arose in *Owen v. Saunders*, 1 Ld. Raym. 158, Salk. 467, 5 Mod. 386, and *Harcourt v. Fox* was expressly referred to. The question was, Whether, under the statute of 1 W. & M., a nomination by the custos rotulorum to the office of clerk of the peace by parol was good? and Mr. Justice Powell, a lawyer of no mean talent and acquirements, said, "It had been objected that this clerk of the peace was originally but a deputy to the custos rotulorum, and therefore not properly an officer. But he was of opinion that he is, and was originally an officer, and not merely a deputy to the custos rotulorum. The statute 12 Ric. 2, c. 10, appoints him wages, and there he is called clerk of the justices of the peace, and he is in the nature of attorney-general to the king, wages being still paid. In 2 Hen. 7, c. 1, he is called clerk of the peace." Lord Chief Justice Treby said, "The original of this office of custos rotulorum is not very clear, but in all probability the trust of the conservator of the rolls was committed to one of the justices, and then he was called custos rotulorum; and probably by the consent of his brethren he nominated the clerk of the peace. He is called so in 13 Hen. 4, c. 10, pl. 33. 12 Ric. 2, c. 10, calls him clerk of the justices, and appoints him wages; and 2 Hen. 7, c. 1, first makes mention of custos rotulorum." Can it have escaped your Lordships that in this case Justice Powell almost goes out of his way to state that the clerk of the peace is not a deputy *39] to the custos, but *an original officer; and that Lord Chief Justice Treby, notwithstanding the previous opinion of Lord Holt, intimates that the origin of the custos rotulorum was not very clear, and that, instead of its belonging to the custos rotulorum of common right and by the common law of the land to nominate the clerk of the peace, he probably was nominated by consent of his brethren? Permit me also to call your Lordships' attention to the charge to the custos rotulorum in the ordinary commissions of the peace, and to the observations as to the duties at the sessions of the custos rotulorum, and the clerk of the peace in Lambard's *Eirenarcha*. The earliest commission I have met with is at the commencement of Herbert's Justice, in the edition of 1547; and at the conclusion it commands "John Fitzjames, that, at the days and places aforesaid, he cause to come writs, precepts, processes, and indictments aforesaid, before himself and his said companions, and inspect and determine the same." In another edition of the same book, printed in 1606, there is a similar clause, except that it seems addressed to all the justices, and not to any one by name; but this may be a mistake in the text, because in the margin it is stated to be "*Al custos rotulorum*;" and the same book, in the form of what is called "the new commission," contains this clause, "Assignavimus denique te præfatum Edw. H. militum" (not the person first named in the commission, for the officers of state are first named), "custodem R. pacis nostræ in dicto comitatu nostro; ac propterea tu, ad dies et loca predicta, brevia, precepta, processus, et indictamenta predicta coram te et dictis sociis tuis venire facias, et inspiciantur et debito modo

terminentur." Lambard, in his *Eirenarcha*, speaks of sessions and, among other things, of the officers bound to attend. "Two sorts of men there are that are the ordinary attendants at the sessions, that is, the officers of the court and the jurors. Among the officers, the *custos rotulorum* hath worthily the first place, both for that he is always a justice of the quorum in the commission, and among them of the quorum a man, for the most part, especially picked out for wisdom and credit, and yet in this behalf he beareth the person of an officer, and ought to attend, for the words in the commission be to him now by his proper name. 'Quod, ad dies et loca predicta, breviam, precepta, processum, et indictamenta predicta coram te et dictis sociis tuis venire facias.' Whereas until the 14 Ric. 2, that charge was general to all the justices, and not laid specially upon any one person in the commission, as it doth appear in the Tower by the records which I have already vouched" (see Lambard, 373, &c., printed in 1602). By the commission in a county, the *custos rotulorum* ought to attend at the sessions, with records, &c. (Com. Justices of the Peace, D. 4); "the clerk of the peace oweth his attendance at the sessions also, for (omitting certain things specified) he readeth the indictments and serveth the court. He enrolleth the acts of the sessions and draweth the process. He also must deliver letters to all such as be acquitted of felony, &c. &c. All which things he cannot do if he be not present; so that he is an officer to this court, and clerk of the justices, as the 12 Ric. 2 nameth him, and not, as Mr. Barrow thought, the clerk of the *custos rotulorum* only." And that, as it seems to me, is the true state of the case: the *custos rotulorum*, though one of the justices, is, in respect of his custody of the rolls, to attend with the rolls in the court, and the clerk of the peace, as a distinct officer of the court, is to record upon such rolls such acts of the court as are to be recorded; and when he has recorded them it is his duty to hand them over to the *custos rotulorum*, that he may keep them in safe custody, though the clerk is entitled to have them whilst in process. In *Rex v. Evans*, 4 Mod. 31, the opinion of Lord Chief Justice Holt approaches this point, where he says the clerk of the peace is bound to deliver the rolls to the *custos* when completed, though he is entitled to have them whilst in process. If there ever was a time when the rolls were in the custody of the justices at large, without any *custos rotulorum*, this would be the case; and I see no reason why it should not continue to be the case when one justice in particular was selected to be *custos rotulorum*. My opinion, therefore, is,—not negatively, that the right of appointing is not with the *custos rotulorum*, nor that the right is affirmatively either with the king or with the quarter sessions,—but that the question with which of them it is, is matter of fact for the consideration of a jury, not matter of law for the decision of a court; and with this view the case of *Bridgman v. Holt*, Show. Parl. Cas. 111, and the state of the officers in the superior courts exactly accords. In *Bridgman v. Holt* the question was, Whether the office of clerk of the peace for enrolling pleas in the King's Bench was in the king or in the chief justice? The defendant, who claimed under the chief justice, proved a series of grants for a period of 235 years, whenever the office became void. It was treated, therefore, as a question of fact, not as a question of law. And what is the state of the other officers of the superior courts, and upon what principle is it to be explained? Why does the chief justice of the King's Bench appoint the *custos brevium* in the King's Bench, whilst the gift of the same office in the Common Pleas is not in the chief justice there, but in the king or his grantee? Why are the first and third prothonotaries in the Common Pleas in the gift of the chief justice, and the second in the *custos brevium*? Why does the king appoint the master of the crown office in the King's Bench, and the chirographer in the Common Pleas? Why is the office of exigenter in the Common Pleas an inseparable incident to the person of the chief justice, so that a grant thereof by the king whilst the office of chief justice is vacant, is null and void? Why do the three puisne judges of the King's Bench appoint the signer of the bills of Middlesex? All is referable to what is mentioned as the ground of the

opinion in *Scroggs v. Coleshill*, Dyer, 175, viz. prescription and usage. And what is the foundation of prescription and usage but a lost grant? Upon the whole, therefore, I submit to your Lordships that the question in whom the right of appointing was in England, before 37 Hen. 8, is matter of fact, depending upon commissions issued in the different counties in England, and the usages thereon; and that, until such matter of fact is duly inquired into and ascertained, it cannot be answered as a question of law.

To the second question,—as every observation I have made upon the first question applies with equal force upon the second,—I submit to your Lordships, that it is also a question of fact, not a question of law, in whom the right in Ireland was.

The third question appears to me to depend upon the point already noticed, viz. the right of the crown in the commissions at first granted under the statute of Ed. 3, to reserve to itself the right of nominating to the office of clerk of the peace; for if the right existed when those commissions were granted, it seems to me to have existed, as to this county, when a commission for this county was first granted: if the crown had originally a right as to each county to mould the machinery as it *pleased, and to reserve to itself such nominations as *43] it thought it behoved the public weal it should reserve, it must have had the same right as to this county, when first it became an object of consideration, as it had in every other. I am therefore of opinion, upon the last question proposed by your Lordships, that the right of appointing the clerk of the peace in the King's County in Ireland, when the district that county comprises was first made a county, was in the crown.

LITTTLEDALE, J. My Lords, upon the first question, I am of opinion that the right to appoint to all the offices connected with the administration of justice is vested in the crown by the royal prerogative; and if the crown by its royal prerogative constitutes a new court of justice, it may appoint the judges of the court, and all the subordinate officers, upon such terms as it shall think proper. So also if the crown, by virtue of an act of parliament, is authorized to constitute a court, it may appoint the judges of that court, and also the officers, in such manner as it may deem most expedient to carry into effect the object of the legislature. But if, in the constitution of a court formed under the authority of parliament, the crown appoints the judges, but does not appoint the officers of the court, but is silent as to the appointment of any officer; then I apprehend, as a matter of law, the power of appointing the officers belongs to the Court itself, or to some member or members of the Court to whom particular duties are assigned, and who, in the discharge of those duties, must commit the performance of the minor part of those duties to some subordinate officer or clerk: if the crown has once waived the right of appointing the officers, and has suffered either the judges of the court at large, or some particular judge to whom special powers are confided, to appoint the officers necessary to conduct the *subordinate business of the Court, then, I apprehend, the crown cannot afterwards interfere, and take from the court, or particular members, the appointment of the subordinate officers; for otherwise great confusion would ensue in the administration of justice, the officers acting under the authority of the Court, but being liable to be displaced: and the crown, by allowing the Court to appoint the officers in the first instance, has manifested its intention that that should be the course of proceeding in the administration of justice in that court. If I am right in taking this view of the subject, I think it will follow that the appointment to the office of clerk of the peace within the shires of England did, by law, previously to the passing of the act of 37 H. 8, c. 1, belong of right to the *custos rotulorum* of the shire by virtue of his office.

The office of *custos rotulorum*, and that of clerk of the peace, are offices created within the time of legal memory. No immemorial usage or prescription can therefore be applied to either of them. But if it be true that, in the cases of ancient courts or superior officers intrusted with the administration of public justice, the principle be recognised that the members of the court, or some

superior officer, have appointed the subordinate officers or clerks to assist in the administration of justice; then I take it, on the creation of new courts or superior officers within time of memory, the same principle will apply, that the Court or superior officer, as the case may be, have, as incident to the court or office, a right to appoint the subordinate officers or clerks,—saving always the right of the crown, on the first creation of the court or superior office, to constitute and regulate it as it thinks proper, both as to the subordinate officers and clerks, and in other respects as the crown thinks fit.

The oldest authority that recognises this common-law principle is the statute of Westminster 2d, 13 Ed. 1, *st. 1, c. 30: "That all justices of the [45 benches from henceforth shall have in their circuits clerks to enrol all pleas pleaded before them, like as they have had in time passed." And Lord Coke, in commenting upon this statute in 2 Inst. 425, says, "This power is as anciently they used to have, that is, by the common law;" and he states the reason why this clause of the act was passed, was, that the king had been informed that he might appoint the officers on the circuits, which this writer declares to belong to the justices, and that they enjoyed the same of ancient time, that is, by the common law; and then he goes on to give the reason of the justices having this power;—(at present, indeed, the senior judge appoints, and has done so for a considerable time past; how this has happened I cannot now ascertain; whether the second judge had acquiesced in the senior judge appointing so long, that it cannot now be objected to; or whether the practice in modern times may be evidence of a usage before the time of legal memory, so as to found a right such as the statute referred to on ancient usage;)"—and the reason thereof is twofold: first, for that the law doth ever appoint those that have the greatest knowledge and skill to perform that which is to be done; second, the officers and clerks are but to enter, enrol, or effect that which the justices do adjudge, award, or order, the insufficient doing whereof maketh the proceeding of the justices erroneous, than the which nothing can be more dishonourable and grievous to the justices, and prejudicial to the party; therefore the law, as here it appeareth, did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments, and this was the common law. The king cannot grant the office of the shire or county clerk (who is to enter all judgments and proceedings in the county court), for that the making the shire clerk *belongeth to the sheriff by the com- [46 mon law, as in Mitton's case it appeared, *et sic de cæteris*." In Mitton's case, 4 Rep. 32, Queen Elizabeth had granted the office of county clerk or shire clerk to Mitton and others. The Queen appointed Hopton to be sheriff of the county, who interrupted Mitton. It was resolved that the county court, and the entering of all proceedings in it, are incident to the office of sheriffs, and, therefore, cannot by letters patent be divided from it; and after adverting to some other points which had been raised, it goes on to state, that, as a general answer to all objections, "great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants should be of validity; for by such, as well the entering of all proceedings in the same court, as the custody of the entries and rolls thereof, do belong to the office of sheriff:" he proceeds afterwards to say, "If the record be embezzled, the sheriff shall answer for it, and therefore it would be full of danger and damage to sheriffs if others should be appointed to keep the entries and rolls of the county court, and yet the sheriff should answer for them as immediate officer to the court; and therefore the sheriff shall appoint clerks under him in his county court, for whom he shall answer at his peril; the same law of the sheriff's tourn; and law and reason require that the sheriff, who is a public officer and minister of justice, and who has an office of such eminence, confidence, peril, and charge, ought to have all rights appertaining to his office, and ought to be favoured in law before any private person, for his singular benefit and avail." And then it goes on to state, that the sheriffs shall have the custody of gaols, and shall put in such keepers for whom they will answer; and the reason given is, because

*47] they shall be answerable for escapes. And it goes on to state, that it would be against all reason that they should be answerable for escapes, and subject to amerciaments, and yet that another should have the keeping and custody of the gaol. The parliamentary declaration in the statute of Westminster, and Lord Coke's Commentary, and also the resolution in Mitton's case, seem sufficient to show, that in ancient offices the right of appointment of the subordinate officers and clerks is in the Court, or the superior officer, as the case may be. And I apprehend, that if a new court or office be created, the same rules will attach, as the reasons for it are precisely the same. The language of Lord Coke in his Institutes, and the language of the Court in Mitton's case, apply in every respect to such officers as the *custos rotulorum* and clerk of the peace, whose case is now under consideration; and with respect to the principle of new offices being to be governed by the rules of the common law, I would refer to the case of *Wilkes v. Williams*, 8 T. R. 31. That was an action on promises, and the defendant pleaded in abatement, that he was a tipstaff of the Court of Chancery, and then he says, that there is an ancient custom in the High Court of Chancery, time out of mind, that all the resident officers, clerks, and ministers of the same Court of Chancery shall be freed and quieted as anciently used to be, according to the liberties and privileges of the Court immemorially used, and ought not to be impleaded elsewhere than before the Chancellor or Keeper of the Great Seal; and on a demurrer, objections were taken, amongst others, to the plea: it was stated to be pleaded as an exemption to offices created within time of memory; as to which the Court held, that such *48] a custom might well extend to newly-created offices; for when an immemorial privilege is claimed for all the officers of the Court, and some offices are made within the time of legal memory, they must also fall within the privilege. So I say here, that if the common law allows ancient courts and superior officers to appoint their clerks and subordinate officers, the same common-law principle applies to new courts and newly-created offices.

The precise origin, either of the *custos rotulorum* or of the clerk of the peace, does not appear to be very well known. There were at the common law persons who were called conservators of the peace. Some of these were such by virtue of certain offices which they held; others appear to have been elected. The precise nature and extent of their functions do not appear clearly defined, nor whether they had a clerk to enrol and enter their proceedings, nor how that clerk was appointed. These conservators were discontinued, and the mode in which the constitution of the conservators of the peace was changed and the present justices of the peace were constituted, will be seen in Lambard's *Eirenarcha*, c. 4, p. 1. Several acts of parliament were made in the time of Edw. 3, viz. 1 Edw. 3, st. 2, c. 16, 4 Edw. 3, c. 2, 18 Edw. 3, st. 2, c. 2, and 34 Edw. 3, c. 1, and the origin of the justices of the peace, as at present constituted, is to be found in these statutes, and, consequently, within time of legal memory; and it may be considered that the last of these was more particularly that which decided the character and constitution of the present justices. These justices at large had at first the custody or keeping of the rolls, and even still they have them in point of law, as all certioraries and writs of error are directed to them. No mention is made in any of these acts of Edw. 3, of any such officer as *custos rotulorum*—and it is not very clear when he was first constituted—nor of any such office as clerk of the peace. But by the 12 Rich. 2, c. 10, *49] the clerk of the justices shall have 2s. a day for his wages, and the clerk of the justices I take to be the present clerk of the peace; and in 11 Hen. 7, c. 15, the *custos rotulorum* is mentioned as being authorized to have the oversight of the sheriffs in the cases mentioned. And it seems from the reference in Lambard, 40, that there was such an office as *custos rotulorum* as early as the 14 Rich. 2. It does not appear whether previously to that time there was any such person as the *custos rotulorum*; and if there was not, the justices would, as incident to their office, have a right to appoint their clerk according to the rules of the common law.

But as soon as the justices became a distinct court, it would be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one place. Lord Holt, in *Harcourt v. Fox*, says he looks upon it it was in the power of the king to appoint some particular person to have the custody and charge of the records, and that he should be a person responsible to the justices for the safe keeping of them; and he says this was thought convenient, for the words at the end of the commission of the peace are, "We appoint you to be keeper of the records and rolls of the county." He goes on to say, "This seems to me to be the commencement of the office of the *custos rotulorum*; for no one being more in commission than another, it was in the power of the king, by his prerogative, to appoint one to keep the records. But, therefore, it does necessarily follow that no person whatsoever could be *custos* that was not a justice of peace in commission." Then Lord Holt goes on to consider how the *custos* came to appoint the clerk of the peace. He says, "The *custos* names him for this reason, because the rolls and records of the sessions being by the commission put into the custody of the *custos rotulorum*, the clerk being the *person that must be trusted with the rolls to make [*50 entries upon, to draw judgments, to record pleas, to join issues, and enter judgments, then by common right and by the common law of the land it belongs to him that hath the keeping of the records to nominate this clerk, and not to any one else; and it would be the most inconvenient thing in the world that the *custos rotulorum*, being intrusted with the custody of the records by his commission, any other should be made clerk of the peace for the actual possession of these records than such a one as he should appoint, when upon any loss or miscarriage he is answerable for it himself to the king and to the subject."

This reasoning of Lord Holt as to the propriety of the person who has the records of a court intrusted to him appointing a subordinate officer to take care of them, is certainly extra-judicial; but it falls in precisely with what is said by Lord Coke in his 2d Inst., commenting on the statute of Westminster 2d, as to clerks of assize, and the language of the Court in Mitton's case.

This conjecture of the origin of the clerk of the peace's being appointed by the *custos rotulorum* is called in question, first, because in 12 Rich. 2, c. 10, he is called clerk to the justices; secondly, because Lambard, in his *Eirenarcha*, at p. 377, calls him, in conformity with the stat. of Rich. 2, clerk to the justices, and not as the clerk of the *custos rotulorum* only; thirdly, because in the Year-book, 2 Hen. 7, fol. 1, he is called the clerk and attorney of the king. He is in the statute of Rich. 2 called clerk of the justices. It does not appear that there was then any *custos rotulorum*; but admitting there was, and taking the assertion of Lambard that at the time he wrote he was clerk to the justices, it does not follow that he is to be appointed by the justices. The justices form the Court, and therefore he may with propriety be called their clerk, because he is to record their proceedings, and it is his duty to attend the Court.

*My Lords, it is to be observed also that the legal custody of the rolls [*51 and records is in the justices, though the actual custody is in the *custos rotulorum*, who is to produce them at the sessions, and upon other proper occasions to the justices; and therefore there is no more inconsistency in calling him clerk to the justices, when he is appointed by the *custos rotulorum*, than there is in saying that the rolls are in the legal custody of the justices, though the actual custody is in the *custos* by virtue of the king's commission. But if Lambard's authority is to be taken, that at the time when there was a *custos* the clerk of the peace was the clerk of the justices, his authority must be taken together, and in the next paragraph he says, "Howbeit" (as much as to say notwithstanding he is clerk to the justices), "the nomination and appointment of him hath long time belonged to the *custos rotulorum*. And this office was also for a time given by the king's letters patent for term of life, as that of the *custos rotulorum* was, until the stat. of 37 Hen. 8, c. 1, recontinued the ancient order of giving it by the *custos rotulorum* only." He therefore considers that the ancient order of giving it was in the *custos*.

Then, as to his being called in the Year-books clerk and attorney of the king, nothing can be inferred against the right of the custos from that: if he is to enter the proceedings on the rolls and records, he is, as far as that applies to entries in which the king is concerned, the clerk and attorney for the king; but that has nothing to do with the right of appointment. The officer on the circuit, who in common parlance is called clerk of assize, is really the *clerk of the assizes* and *clerk of the crown*, and is so called in his grant of office.

The statute of Westminster speaks of the justices within circuits appointing their clerks to enrol pleas pleaded before them, in general terms; and when *52] his *duties come to be specified, he is called clerk of the assizes and clerk of the crown; that is, he is the clerk of the assizes as to those things which relate to civil suits, and clerk of the crown as to those things which relate to the crown.

It is not material to consider in what relation he stood to the custos, whether he is his deputy or his clerk, or the clerk to the body of justices for whom the custos keeps the rolls and records; but the question is, in whom is the right of appointment? He cannot be considered as the deputy of the custos in the legal sense of the word, because a deputy may perform all the duties of the principal, which the clerk of the peace cannot. Besides the case of *Harcourt v. Fox*, there is the case of *Saunders v. Owen*. That was an assize of novel disseisin in the office of clerk of the peace. The case turned upon the manner of the appointment, because at that time there was no doubt about the right of the custos to appoint. In the report of the case in *Salkeld*, the Court say that it always belonged to the custos rotulorum to nominate the clerk of the peace; but the clerk of the peace was removable whenever the custos rotulorum was removed or changed, and moreover was removable at the will of the custos till the 32 Hen. 8, which makes him continue in *quousque* the custos shall continue in. This, therefore, is a declaration of the Court as to the original right of the custos, which also considered that the effect of the stat. of 37 Hen. 8 only altered the period of the duration of the office. In *Jenkins*, 216, pl. 59, it is stated that the custos rotulorum appoints the clerk of the peace. In *The King v. Evans*, 4 Mod. 31, the custos rotulorum was displaced, and the clerk of the peace refused to deliver the rolls to the new custos. He was indicted and found guilty, and removed from his office, and brought a mandamus to be restored. It *53] had been said he was a *ministerial officer to the custos, and ought to deliver the records to him at the end of the sessions. The Chief Justice said "the clerk of the peace ought to make out all the process, which cannot be done without the rolls. When they are completed, he must deliver them to the custos; but so long as they are in process, they are to be with the clerk of the peace; and therefore it seemed reasonable that the defendant should be restored;" but three Judges were of a contrary opinion. This case does not seem to prove much either way as to the right of appointment, but only as to the conduct of the clerk of the peace, and that the custos might require the rolls to be delivered to himself if he thought fit; of which there could be no doubt. The case is also reported in 1 Show. 262, and 12 Mod. 13. In the latter case Holt says the custody of the rolls belongs to the custos rotulorum: the clerk of the peace is a distinct officer, and not a mere servant. A peremptory mandamus was ordered.

Then it is material to consider whether the statute of 37 Hen. 8, c. 1, throws any light upon this subject. It begins, "Where before this time the Lord Chancellor of England for the time being hath, by reason of his office of the chancellorship, the nomination and appointment of the custos rotulorum, and that in like manner all and every person which hath had and enjoyed the said office of the custos rotulorum hath had until now of late the nomination and appointment of the clerk of the peace; and whereas now of late divers and sundry persons not having learned, nor being able for lack of knowledge to exercise the offices of custos rotulorum and clerk of the peace, have, of late years, by labour, friendship, and means, attained and gotten for term of their

lives, of the king's majesty, several grants by his highness's letters patent to them made of the said clerkship of the peace:" and then it goes on to enact *how these offices shall be appointed to in future; and, as to the clerk of the peace, that he shall be appointed by the custos. Further acts of parliament have since been passed as to these offices, but they are not material to the inquiry. This recital then appears to contain a direct recognition of the right of the custos rotulorum to appoint the clerk of the peace. It says that the custos hath had until now of late the nomination and appointment. That must mean the rightful nomination and appointment. And then it goes on to give the custos a distinct power of appointment to hold the office as long as he should continue custos.

It may, however, be said that this act cannot be taken to recognise any pre-existing right in the custos, because it says that the Lord Chancellor had, by virtue of his office, the nomination and appointment of the custos, and which he had not by law. I admit that he had it not by law; the only way to account for this recital in the act is, that in point of fact he had exercised the right; and which he probably had done because he made out the commission, and he might consider that it was proper for him to direct who were to keep the records. But, at all events, there is a parliamentary recognition that the crown had not appointed the clerk of the peace at the first formation of the court of the justices, because it says that the custos rotulorum had until now of late appointed the clerk of the peace, and that now of late persons had got grants from the crown; and of course it follows that at the first formation the crown had not exercised the right; and that being so, the title of the crown cannot be supported; and then it becomes a question whether the nomination be in the justices at large or in the custos rotulorum.

It may be said there are a great many offices in courts of justice where the power of nomination is not as is *contended for by the plaintiff in error. [*55 No doubt many are in the crown: as to which I consider that the right of nomination was waived by the crown on the original formation of the court. In others it is in the Chief Justice; and, as to them, I consider that the right of the Chief Justice is founded in prescription, which has taken it away from the Court at large. And there are subordinate officers or clerks who are appointed by the superior officers. In the case of Scroggs v. Coleshill, the office of exigenter became vacant in 1558, and afterwards Sir Richard Brooke, Chief Justice of the Common Pleas, died, and during the vacancy of both offices Queen Mary granted the office of exigenter to Coleshill, and afterwards granted the office of Chief Justice to Anthony Brown, who refused to admit Coleshill, and granted the office to Scroggs. And then in 1 & 2 Eliz. the rights of the parties were discussed, and it was held by the Judges present, viz. the Judges of the King's Bench and the Chief Baron, the Judges of the Common Pleas being excluded, that the title of Coleshill was null, and that the right of the office by no means and at no time belongs or can belong to the Queen, but is only in the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the person of the Chief Justice by reason of prescription and usage. At the end of the case a reference is made to the statute of Westminster, and it then goes on:—"And so it seems in reason that the justices were before the clerks, and made clerks at their pleasure." In this case the title of the Chief Justice stands upon usage and prescription, and very properly so, because by the common law the right to appoint the officers of the Court was in all the Judges of the Court, and the Chief Justice alone could only appoint by usage and prescription. But the case is important in this point of view, that it says the gift of the office by no means and at no time belongs or can belong to the Queen; and the question then, I apprehend, was [*56 between the right of the whole Court and the right of the Chief Justice, which latter could only be founded by prescription.

The next case to that of Scroggs v. Coleshill is in Dyer, 176 a, by which it appears that the office of chirographer and of custos brevium in the Common

Pleas both belong to the king. The next case is that of the *Duchess of Grafton v. Hall*, Skin. 345, and *Bridgman v. Hall*, in *Shower's Parliamentary Cases*, 111. That was a question between the crown and the Chief Justice of the King's Bench, as to the right of appointing the chief clerk of the King's Bench. The Chief Justice claimed the right by prescription; and one question was, whether the prescription was interrupted by an act of parliament of 15 Ed. 3: but the right of the Chief Justice was put on the point of prescription, and not upon the common-law right, for that would have given it to the whole Court.

Another question is, whether this right of nomination is not a matter of fact to be decided by a jury, rather than as a matter of law. But I think it is a question of mere law for the reasons I have given. The only thing that could be considered as a matter of fact to be tried by a jury, would be, whether the crown had reserved the right of nominating the clerk of the justices, or whatever he may be called, at the time when the first commission issued for appointing justices of the peace; and I think that courts of law may take judicial notice that they did not do so, from a total absence of anything appearing to countenance such a supposition, and from the language of the stat. of 37 H. 8, where *57] such exercise, in fact, is distinctly negatived, and from the *various authorities which I have referred to as to the office in question, in none of which is it in any way supposed that the crown did exercise such a right in the first instance.

It may be said, that in the counties palatine a different rule prevails; that in the county palatine of Lancaster the clerk of the peace is not appointed by the *custos rotulorum*; and that in Durham the bishop does not appoint in the character of *custos rotulorum*. Whatever is done in the counties palatine is not necessarily according to the rule of the common law, but it depends altogether on the particular constitution of each county, as it was originally formed by act of parliament or otherwise; and I do not consider that what has been done in counties palatine can affect the general principles of the common law.

I am therefore of opinion, on the first question, that the appointment to the office of clerk of the peace within the shires of England did by law, previously to the passing of the act of 37 H. 8, c. 1, belong of right to the *custos rotulorum* of the shire, by virtue of his said office.

The law of Ireland before the time of H. 2 was the Brehon law. King John, in the 12th year of his reign, is said in Co. Lit. 141 a, to have gone into Ireland, and there, by the advice of grave and learned men in the laws, whom he carried with him, to have ordained and established that Ireland should be governed by the laws of England. Some of the Irish accepted, but others objected to this. In the parliament of Kilkenny, 40 Edw. 3, the Brehon law was abolished. In Poyning's Law, 10 H. 7, it is stated that English statutes before that made in England shall be in force in Ireland. Whatever, therefore, were the rights of the crown, or other persons in England, at the formation of the courts of justices in England, were also the rights of the corresponding persons in Ireland. *58] *No act of parliament in Ireland before the year 1800 took away the rights of the *custos*. I am of opinion, therefore, on the second question, that the appointment of the office of clerk of the peace within the shires of Ireland did by law, in and previously to the year 1800, belong of right to the *custos rotulorum* of the shire, by virtue of his said office.

The appointment of the King's County was, by 3 & 4 Ph. & M. c. 2, s. 3. A new county, with all the officers attached to it, will follow the rule of all other counties; and if the crown, at the time of the original formation of the court of the justices in England, did not exercise the nomination and appointment of the officers, it could not do so in Ireland, either when the court of justices was first formed there, or at the time of the formation of the King's County. The clause is as follows:—"And be it also enacted, by the authorities aforesaid, that the new fort in Offally be from henceforth for ever called and named Philipstown, and that the said countrie of Offally, and such portion of the said Glinaltry as

standeth and is situated of that side of the river of Barrow, whereup in the said Philipstown standeth and is situated, and all the seigniories, honors, manors, lands, tenements, and hereditaments of the same country and portion, and every of them, be from the feast of St. Michael the Archangel, next coming after the first day of this present parliament, one shire or countie, named, known, and called, the King's Countie; and shall from the said feast be taken, reputed, and used as a countie or shire to all purposes for ever; and that there shall be appointed, ordained, and made, within the said countie or shire, for the rule thereof, and execution of things there, sherife, coroners, escheator, clerke of the market, and other officers and ministers of justice, yearly, as in other the shires or counties of this realm of Ireland be or should be."

*I am therefore of opinion, as to the third question, that the right to appoint to the office of clerk of the peace within the King's County of [*59 Ireland did, by law, in and previously to the year 1800, belong to the *custos rotulorum* of the said shire, by virtue of his said office.

GASELEE, J. My Lords, as I have reason to believe that all my learned brethren who are now present, with the exception of one only, will concur in the answers which have been given by my learned Brother who has preceded me, to the several questions propounded by your Lordships, and as he has entered so fully and ably into the investigation of the grounds and reasons on which he has founded those answers, I think it is not only unnecessary, but that it would be an inexcusable waste of your Lordships' time were I to enter into any lengthened discussion upon the present occasion. I shall, therefore, content myself with saying, generally, upon the first of these questions, that it appears to me clearly that the act of parliament referred to is a declaratory act, and that upon an attentive consideration of that act, and the several authorities which have been cited and commented upon by my learned Brother, I am of opinion, that the appointment to the office of clerk of the peace within the shires of England, did by law, previously to the passing of the act of 37 H. 8, c. 1, belong of right to the *custos rotulorum* of the shire by virtue of his said office.

Upon the second question, in the absence of any means of ascertaining precisely the course adopted upon the introduction of the sessions and of the offices of *custos rotulorum* and clerk of the peace into the kingdom of Ireland, the natural presumption is, that it would be that which had been pursued in England.

*But it does not rest on presumption only: the three cases of *The King v. Ferguson*, and *The King v. The Justices of the Peace of the County of* [*60 *Tipperary*, and *The King v. Severney and Falkiner*, clerk of the peace in the said county, cited in the Appendix to the case of the plaintiff in error, appear to me to be decisive authorities in support of the right of the *custos rotulorum*: it is clear also that the grant under which the defendant in error claimed, which is a grant of the office of clerk of the peace of the whole province of Leinster, of which the county of Longford and also the King's County are members (except Kilkenny), is dated 30th July, 1798; and that seven months after the date of that grant the right of Ferguson to the office was established. I am, therefore, of opinion that the appointment to the office of clerk of the peace within the shires of Ireland did, by law, in and previously to the year 1800, belong of right to the *custos rotulorum* of the shire by virtue of the said office.

Upon the third question, I do not see any sufficient ground for making a distinction between the King's County and the other shires of Ireland.

The act of parliament constituting the King's County does not make any. The clause is very short; it enacts that certain portions of land therein described shall be one shire or county named and called the King's County, and shall be taken, reputed, and used as a county or shire to all purposes for ever.

It goes on to add, that there shall be appointed, ordained, and made within the said county or shire, for the rule thereof and execution of things there, sheriffs, coroners, escheators, clerks of the market, and *other officers and ministers of justice* yearly, as in other the shires or counties of this realm of Ireland be or should be.

*61] It might perhaps be sufficient to say, that the clerk *of the peace is one of the officers and ministers of justice. But in addition to that, the case of the county of Monmouth is strictly analogous to the present, the statute making it an English county. It says nothing of a *custos rotulorum*, yet he is appointed and appoints the clerk of the peace in the same manner as is done with other English counties. It is made an English county by 27 H. 8, c. 26. I do not find that there was any *custos rotulorum* of any of the Welsh counties until after that period. The 27 H. 8, c. 5, authorizes the making justices of peace within Chester and Wales.

By the 34 & 35 Hen. 8, c. 26, intituled, an act for certain ordinances in the king's dominions and principality of Wales, reciting, that there were twelve shires in Wales, eight old ones and four new, by 27 Hen. 6, besides Monmouth, it enacts, s. 53, that in each of the twelve shires there shall be justices of the peace and *quorum*, and also one *custos rotulorum*; and by s. 54, that the said justices of the peace, justices of the *quorum*, and *custos rotulorum* shall be named and appointed by the Chancellor of England by commission under the king's great seal of England. It takes no notice of the clerk of the peace, who, I believe, is constantly appointed by the *custos rotulorum*, as in the English counties.

With respect to the length of time during which the crown appointed the clerk of the peace in the King's County, I observe, that in the case of *The King v. Falkiner*, it appeared the crown had appointed the clerk of the peace in Tipperary for a very considerable period, but notwithstanding that, the right was held to be in the *custos rotulorum*.

I therefore state it to your Lordships as my humble opinion, that the right of appointment to the office of clerk of the peace within the King's County in *62] Ireland *did by law in and previously to the year 1800 belong to the *custos rotulorum* of the shire by virtue of his said office.

VAUGHAN, B. With reference to the last two questions, it is to be considered as admitted that the crown, if it ever possessed the right of appointment to the office of clerk of the peace within the shires to which these questions refer, has never parted with that right, unless it passed to the *custos rotulorum* in each county merely by virtue and in right of his said office of *custos rotulorum*.

To the first question, my Lords, I answer, that the office of clerk of the peace within the shires of England did, by law, previously to the passing of the act of 37 Hen. 8, c. 1, belong of right to the crown. The king by prerogative has the creation of all powers and offices in the state, especially those connected with the administration of justice. Whoever, therefore, insists on the right to appoint to any such office must, to establish a legitimate claim, derive his title through the crown. But I apprehend this may be done either, first, by grant from the crown; secondly, by prescription, which presupposes such grant; thirdly, by act of parliament, to which the king is a consenting party. It is not argued, nor is there colour for contending that the appointment to the office of clerk of the peace rests on any act of parliament as its foundation prior to the 37 Hen. 8. Nor can the doctrine of prescription, in the legal acceptation of that term, assist the claim, because neither the office of *custos rotulorum* nor of clerk of the peace has any existence before the time of legal memory. The case of the plaintiff in error must depend, therefore, on the question, whether the right of the *custos* to appoint can be derived from any grant medi- *63] ately or immediately *from the crown; and on this ground I conceive it may be defended. When I use the words mediately or immediately, I would be understood that the right to appoint to the office of clerk of the peace may be derived through the crown by the grant of some other office to which it may be inseparably incident, and that it did of right belong to the office of *custos rotulorum* to appoint to the office of clerk of the peace in England, not by virtue of any express grant from the crown, but as incidental to the office of *custos rotulorum* prior to the statute of 37 Hen. 8. *Accessorium sequitur principale*. It passes as an accessory to its principal.

I think, my Lords, that can be shown by a consideration, first, of the origin and nature of the respective offices of *custos rotulorum* and clerk of the peace, and of their relative duties as arising out of and connected with the commission of the peace; secondly, by the strongest legislative declarations and recognitions on the subject; thirdly, by the authority of solemnly-adjudged cases, some of which appear to me to be strictly analogous; and by the declarations and opinions of the most eminent Judges. And first as to the origin (as far as it can be traced) and nature of the respective offices and their duties as connected with the commission of the peace.

My Lords, it is difficult to fix with any precision the period when any of these offices were first created. Their origin is involved in obscurity; and if the attempt to discover it eluded the researches of the eminent Judges, who must have employed many watchful hours in this inquiry in the reign of William III.,—I allude to the case of *Harcourt v. Fox*,—the subsequent lapse of 130 years has only enveloped the subject in darker mystery. That the office of *custos rotulorum* is not an immemorial one must be conceded, because the *commission of the peace, which gave birth to it, is within the time of [*64 legal memory; but that it is a very ancient office will not be disputed. In what manner the peace was maintained in very ancient times, and before the reign of Edward III., whether by persons under the name of conservators; whether some of them (for example) the king's justices and inferior judges and ministers of justice, as sheriffs, constables, tithingmen, headboroughs, and the like, were *ex officio* wardens of the peace; whether others were entitled to hold the same office by tenure or prescription; whether others were elected in full county court in pursuance to a writ directed to the sheriff for that purpose; whether others again were occasionally appointed by a committee of the crown; what was the extent of their authority, and what the precise limits of their jurisdiction,—are questions which it might gratify a spirit of antiquarian curiosity to investigate, but from which investigation I conceive no clear light would be reflected to guide us in our present inquiry.

Before the reign of Edward III. it should seem that commissions of the peace were not confined within the limits of particular counties, nor addressed exclusively to persons resident within them: their authority, however, was restrained strictly *ad conservandam pacem*.

As soon as ever Edward III. ascended the throne, which became vacant by the imprisonment, deposal, and murder of his father, the statute of 1 Edw. 3, c. 16, was passed, intitled, "who shall be assigned justices and keepers of the peace," and containing this simple enactment. "Item.—For the better keeping and maintainance of the peace, the king wills, that, in every county good men and lawful, which be no maintainers of evil nor barrators in the county, shall be assigned to keep the peace." This short and general act gave very limited authority to the persons to be appointed under *it, making them [*65 nothing more than conservators of the peace nominated by the crown, in addition to those who were already such by the pre-existing laws and usages of the realm. Within three years afterwards, these justices and keepers of the peace were intrusted with somewhat more enlarged powers, being invested with the additional authority to take but not to try indictments. The statute of Edw. 3, c. 2, after some regulations respecting the appointment of justices of assize and gaol delivery, ordained that there should be assigned good and lawful men in every county to keep the peace; and the justices assigned to deliver the gaols had power given them to deliver the gaols of those that should be indicted before the keepers of the peace; and such keepers were directed for that purpose to send their indictments before those justices. After this statute I find no material alteration in their authority until the eighteenth of the same reign, when they were to be empowered by a commission from the crown (if need should be) "to hear and determine felonies and trespasses," 18 Edw. 3, c. 2. Title—"Justices of the peace shall be appointed, and their authority." Item.—"That two or three of the best of reputation in the counties shall be assigned keepers

of the peace by the king's commission; and at what time need shall be the same with other wise and learned in the land, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same county, and to inflict punishment reasonably according to law and reason, and the manner of the deeds." When in obedience to this statute it was prayed by the Commons, in the twentieth year of the same reign, that they might have a power to hear and determine felonies, it was answered, that the king would appoint learned persons for that office.

*66] "So, in the twenty-first year of the same monarch, the commons being charged to advise the king what was the best way of keeping the peace of the kingdom, they recommended that six persons in every county, of whom two were to be *de plus grounds*, two knights, and two men of the land, and so more or less as need should require, should have the power and commission out of Chancery to hear and determine the keeping of the peace.

In conformity with these petitions and statutes, and others which may be seen in Cotton's Extracts from records in the Tower, commissions were at various times framed, assigning certain persons to execute the powers which the statutes authorized the king to confer; in which, in addition to the general powers for keeping the peace, a special charge was introduced to enforce the observance also of particular statutes, viz. the statutes of Winton, 2 Edw. 3, and the statute of Northampton, 20 Edw. 3, with some others.

But the general standing authority given to the justices to hear and determine felonies and trespasses, thereby constituting them complete judges of a court of record, was not conferred upon them until the 34 Edw. 3, c. 1, and I conceive that statute gave occasion to the commencement of the office of *custos rotulorum*, and the necessity of appointing an office to make and keep the rolls or records of the peace, naturally arising out of the execution of this commission, so much enlarging their jurisdiction and powers. Observe the title and language of the stat. 34 Edw. 3, c. 1:—"What sort of persons shall be justices of the peace, and what authority they shall have." The act states, first, "In every county in England shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the

*67] land, and they shall have power, &c. And also to hear and determine, at the king's suit, all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid."

I have endeavoured to trace the rise and progress of the growing authority and jurisdiction of the justices of the peace, with a view to ascertain whether they had power to hear and determine felonies and trespasses until the 34 Edw. 3, and consequently were a court of record before that time; because, if I am correct in supposing they had no such authority, there was no necessity for any such officer as *custos rotulorum* or clerk of the peace, nor do I believe either of them to have existed in fact prior to that period. But a court of record being then organized, and the justices assembled for the first time under the commission directed by that statute, I apprehend it would of right belong to them, as incident to the administration of their justice, having records which must be in their custody, to appoint an officer, by whatever name he might be called, whether clerk of the crown, clerk of the justices, or clerk of the peace, to assist them in drawing their indictments, in arraigning their prisoners, in joining issues for the crown, in entering their judgments, in awarding their process, and in making up and keeping their records.

The nature of these duties may sufficiently account for his being sometimes called not only clerk of the peace, but also clerk and attorney for the crown; Year Book, 2 Hen. 7, p. 31, pl. 2; where a question arose whether all the justices of the peace ought to bring their recognisances to that justice who was *custos rotulorum*: all agreed it was good so to order it, and well done; and the clerk of the peace at the sessions is there described as clerk of the peace, who

*68] is clerk and attorney for the advantage of the king.

In *Harcourt v. Fox*, as reported in 4 Mod. 173, *and in *Holt's Reports*,

189, the Court is reported to have affirmed that the first beginning of a *custos rotulorum* was in the 34th year of the reign of Edw. 3, and that the reason why he was appointed at that time was, because the justices of the peace could not then agree among themselves who should keep the records; and that upon application made to the king concerning the matter, his majesty (to prevent all disputes) appointed a fit person to keep them, and gave him the custody of the records in every county. But, my Lords, from very careful perusal of what may perhaps be considered as a more full and accurate report of the same case in 1 Shower, where the opinions of the judges are reported *seriatim*, I do not collect with certainty that the *custos rotulorum* was nominated by the crown so early as in the 34th year of the reign of Edw. 3. Lord Holt indeed observes, "That that statute gave occasion to the commencement of the office of *custos rotulorum*; for the justices being judges of record, the records of that court must be in their custody. But as it might be inconvenient that the records should be dispersed amongst them promiscuously, and not kept together in one hand, it was in the power of the crown to appoint a particular person to have the custody and charge of them." Such is the language ascribed to Lord Holt by the report in Shower; but at what precise period of time the king first exercised that power, whether on the issuing of the first commission after the 34 Edw. 3, or in consequence of the supposed disagreement stated to have arisen amongst the justices themselves, does not distinctly appear in the judgments of any of the judges, and I incline to the opinion that it was not until a later period.

To hazard any conjectures on the subject is (to adopt the phrase used in the argument of Harcourt v. Fox, *ambulare in tenebris*; but whatever cloud may obscure *this inquiry, my researches have led me to conclude, that in a [*69 short succession of years subsequent to the 34 Edw. 3, the king introduced the clause now found in every commission of the peace, containing a special designation of the *custos rotulorum* by name. This fact is manifested from several passages in Lambard, who, in page 40 of his valuable work, says, "That the earliest commission extant, expressly appointing by name the individual to whom the custody of the records of the peace was committed by the crown, was in the fourteenth year of the reign of Richard II." In mentioning the alterations made in the terms of the commission of the peace, he adds, "And Stephen Beteman was then the first for Kent, to whom the credit of the records of the peace was thereby committed, which officer is now since then called the *custos rotulorum*; all which matters you may find in the records, 28th of June, 14 R. 2, part 2, membrana 35."

From whence I infer, that although during the interval between the 34 Edw. 3 and the 14 R. 2, comprising a period of about thirty years, the justices generally had the custody of the records, and, as incident to that custody, the appointment of any ministerial officer to assist them in that duty (by whatever name he might be called); yet when, in progress of time, whether from differences arising between the justices themselves, or from any other cause, the crown appointed the *custos rotulorum* by name (a course of proceeding, which, according to Lambard, obtained from the 14 Rich. 2), that appointment, in my judgment, drew after it as incidental to it the nomination of the clerk of the peace, by reason of his possession and custody of the records. It is true, there is no mention of clerk of the peace by that precise name until some time after the statute 12 Rich. 2, c. 10, which recognises an officer as ministerial to the justices in the discharge of their duties at *the sessions, under the denomination of their clerk. The clause to which I refer is that which directs [*70 that every of the said justices shall take for their wages four shillings the day, for the time of their sessions, and their clerks two shillings; but I conceive there is nothing in that statute to negative the presumption that the officer therein described as clerk of the justices was, in fact, clerk of the peace; because, whether called clerk of the justices of the peace, or, by abbreviating

the expression, clerk of the peace, the same individual officer performing the same duties, is clearly designated.

Indeed, in the thirteenth year of the reign of Hen. IV., the reign immediately succeeding that of Richard II., and within twenty years of the period of time when the crown had introduced into the commission of the peace the name of an individual justice as the keeper of the rolls, I find the clerk of the peace described in the year-books 18 H. 4, p. 10, pl. 30, as clerk of the sessions of the peace; for it is there stated, that at a gaol delivery in the castle of Sarum, one of the justices, Hawkes, addressing himself to Horn, who was clerk of the sessions of the peace, directed him to take down the name of the prisoner who was not then indicted, that he might be inquired of at the next sessions of the peace.

I now, my Lords, proceed to the consideration of the question, Whether there be not on the rolls of parliament a direct legislative recognition of the right of the custos to appoint the clerk of the peace, and beg leave to refer to the statute 37 H. 8.

In my humble judgment, the language of the statute is plainly declaratory of the right of the custos by law to appoint to the office of clerk of the peace; nor can I conceive that the law-officers of the crown, whose duty it was to protect the rights and interests of his majesty, would have permitted such a preamble to have stained the rolls of parliament, unless they had regarded the
 *71] "recent grants by his highness's letters-patent of the clerkship of the peace as an encroachment and usurpation upon the ancient legitimate right of the custos to appoint by virtue of his office. The immediate occasion of passing that statute will appear from the language of the preamble:—"Whereas before this time the Lord Chancellor, by reason of his office, (hath) had the nomination and appointment of custos; and that in like manner (that is, by reason of his office and incident thereto) all and every person which had and enjoyed the said office of custos, hath had until now of late the nomination and appointment of clerk of the peace;" then it goes on to recite the mischiefs resulting from the nomination of persons not sufficiently learned to exercise the said offices, by reason whereof indictments for felony and murder, and other offences and misdemeanors, and the process awarded upon them have not only been frustrate and void sometimes by negligent engrossing, by the embezzling or rasure of the same indictments, but also sundry bargains and sales have also been void for lack of sufficient enrolment of the same.

Some of the duties of custos rotulorum are here enumerated; viz. the drawing of the indictments for felonies and other offences; the keeping of them, and the awarding of process upon the same; and the enrolment of bargains and sales. That these duties extend as well to the proper making as to the keeping of the records cannot be disputed; for if the naked custody of them, without regard to their due entry and enrolment, were the only office required from the custos or his agent, the lack of sufficient knowledge could not have been urged as the mischief which called for a remedy. From this act, therefore, I conceive the inference almost irresistible, that the clerk of the peace had at all times until
 *72] recently, before the passing of it, been appointed *by the keeper of the records. In this opinion I am fortified by great authorities. Lambard, in commenting upon this statute, p. 378, after observing that the nomination and appointment of clerk of the peace had long time belonged to the custos rotulorum, adds,—“And this office was also for a time given by the King's letters-patent for the term of life, as that of the custos was, until the second act of 37 H. 8, c. 1, recontinued the ancient order of giving it by the custos rotulorum only.”

Is it possible for language to express in terms more clear, appropriate, and forcible, the opinion entertained by this author, that this act was declaratory of the legitimate right of the custos to appoint, and of his sense of the usurpation of the crown? Byres, J., in the case of Harcourt v. Fox, as reported in 1 Show. 518, in discussing the several provisions of the statute 37 H. 8, expresses his

opinion that it must be regarded as a declaratory law. He expresses himself in these terms:—"From all which parts of this act so penned, I think it must be obvious to every man's understanding, that this act was but declarative of what the law was before the making of the act." Nor does it appear to me that the argument of its being a declaratory law is at all weakened, or the right of custos to appoint the clerk of the peace in any manner impugned, by the fourth or fifth sections of the act;—the first of which continued and confirmed all such as (being found when the act passed, in the actual possession of those offices) had derived their titles to them under any letters-patent or commission from the crown; and the last of which, the fifth section, reserved to the Archbishop of York, the Bishop of Durham, the Bishop of Ely, and every of their successors, the exercise of the same rights which they had been accustomed to enjoy.

The fourth section, my Lords, I think, can be *regarded only as the confirmation of a suspicious and doubtful title. For if the King's right to [*73] appoint had been clear and unquestionable, where was the necessity of a special enactment to establish it? Nor does the view which I have taken of the character of this monarch induce me to conclude that he would have condescended to compromise an acknowledged right in the crown upon the terms of continuing the then present possessors in office for the period of their lives. As to the fifth section, I am not aware that any argument has been founded upon the construction of this clause unfavourable to the right of the custos. Those jurisdictions are specially excepted from the general provisions of the act. They may or may not have originated in similar usurpations, and it may have been thought expedient to confirm the Archbishop of York, the Bishop of Durham, and the Bishop of Ely, and their successors in the exercise of all the liberties and authorities, according as they had enjoyed the same by the seal of a parliamentary enactment.

My Lords, I cannot close my observations on this statute without remarking, that although the reign of Henry VIII. has been considered as a very distinguished era in the annals of our judicial history, yet the royal prerogative was then strained, more particularly in his latter years, to a very tyrannical height, and its encroachments sanctioned (to use the language of the elegant commentator on the laws of England) by those pusillanimous parliaments, one of which, to its eternal disgrace, passed a statute, whereby it was enacted that the King's proclamations should have the force of law.

I now propose to show by cases strictly analogous, and by the opinions and judgments of the most eminent lawyers formed after much consideration, that the appointments of the clerk of the peace may properly be regarded by law as incident to the office of custos. Mr. *Justice Gregory, in *Harcourt v. Fox*, 1 Shower, 523, says, "I do not see but that the clerk of the peace [*74] being an officer relating to the execution of the law, his office must be governed by those rules which govern other offices of the like nature." I would, therefore, adopt this mode of illustrating the subject, and refer to the several offices of clerk of assize, of the shire clerk in the county court of the sheriff, of the exigenter of the Court of Common Pleas, and the clerk of the pleas in the Court of King's Bench. I would apply the reasoning by which the right to appoint to those offices was sustained, and the principle to be extracted from them, namely, that law and reason require that the custos should appoint, to the question I am called to answer.

To take first the office of clerk of assize; it is difficult to conceive two offices bearing a stronger resemblance to each other than that of clerk of assize and clerk of the peace. The relation of clerk of the peace to the justices at sessions, is precisely the relation of clerk of assize to the justices of assize: they are the very indenture and counterpart, formed upon the same model, created by the same necessity, and discharging the same duties. By whom is the clerk of assize appointed? By the justices of assize. If it be said that the justices of assize derived their right to appoint from the provisions of the statute of Westminster, which transferred it to them from the crown, I would answer that their right is laid in a deeper foundation, not in the statute, but in the common law.

For, according to my Lord Coke, there exists a common-law principle, which, without trenching upon the prerogative of the crown, gives to the justices of a court the right of appointing such officers as are necessary auxiliaries to them in the discharge of their judicial functions, and for whose qualifications and fidelity they are responsible. This principle is directly recognised by Lord Coke in his *75] Commentary upon the statute of *Westminster 2, from which, according to his opinion, the judges of assize had exercised this right long before the existence of that statute. "Habeant de cætero omnes justiciarii de bancis in itineribus suis clericos irrotulantes omnia placita coram eis placitata, sicut antiquitus habere consueverint." Statute of Westminster 2d, c. 30, 2 Inst. 425. "Hereby it appeareth that the justices of courts (generally) did ever appoint their clerks; as here it is put, for example, that the justices of the benches in their circuits had clerks that enrolled all pleas pleaded in them, as anciently they used to have, i. e. by the common law." In the next passage he reiterates and confirms the same position, that this branch of the statute declareth it to belong to the justices, and that they had enjoyed the same of ancient time, i. e. by common law. Here, then, is a studious disclaimer of the statute of Westminster, as being the origin of the right, and an anxiety manifested to prevent any misconception of his clear opinion, that the appointment did of right belong, and was incident to the common law. His reasons for this opinion appear to me conclusive, and his authorities incontrovertible: "and the reason thereof is twofold: First, the law doth ever appoint those who have the greatest knowledge and skill;" secondly, he says that the officers and clerks are but to enter, enrol, or effect that which the justices adjudge, award, or order, the insufficient doubt whereof maketh the proceeding erroneous; therefore the law (as it here appeareth) did appropriate to the justices the making of their own clerks and officers, and so to proceed judicially by their own instruments; and this was the common law.

"The king cannot grant the office of clerk of the shire or county clerk (who is to enter judgments and proceedings in the county court), for that the making *76] of the shire clerk belongeth to the sheriff, of the common *law; as in Mitton's case, it appeareth, *et sic de cæteris*," 4 Rep. 31. It appears that Queen Elizabeth by patent granted the office of county clerk to Mitton for life, and afterwards constituted Arthur Hopton, sheriff of Somerset, who interrupted Mitton, claiming the appointment as incident to his office of sheriff, and thereupon appointed a clerk himself of the county court. For Mitton it was argued the grant was good, because the county court was the queen's court, and that the queen might, in her own court, appoint a clerk to enter the judgments and proceedings. Secondly, that A. H., who was made sheriff after the patent, could not avoid it, for the sheriff held his office only at the will of the queen, who might determine it at her pleasure, and the queen had granted it to Mitton for life. Thirdly, precedents were shown, by which it appeared that such offices had been granted by King Henry VIII.

It was resolved by the two Chief Justices and all the Judges, *nullo contradicente aut reluctantæ*, that the patent was void in law; that the office of sheriff was an ancient office, before the conquest, of great trust and authority; and although the king appointed the sheriff *durante bene placito*, yet he could not determine in part, nor abridge him of anything incident or appurtenant to his office. Resolved that the county court, and the entering of all proceedings in it, are incidental to the office of sheriff, and therefore cannot be divided from it. And Scrogg's case, 2 Eliz., was cited. The *exigentæ's* case was referred to in Dyer, 175, as to the third objection.

But for general answer to all objections, it was observed that great inconvenience would ensue to sheriffs, who are great and ancient officers and ministers of justice, if such grants are valid. For that as well the entry of all proceedings in the same court, as the custody of the *77] entries and rolls thereof, do belong to the office of sheriff; *and if the record be embezzled, the sheriff shall answer for it; and there-

fore it would be full of danger and damage to sheriffs if others should be appointed to keep the entries and rolls of the county court, and yet the sheriff should answer for them; and therefore the sheriff shall appoint clerks under him in his county court, for whom he shall answer at his peril. And law and reason require that the sheriff, who is a public officer and minister of justice, and who has an office of such eminence, confidence, peril, and charge, ought to have all right appertaining to his office, and to be favoured in law. This is illustrated by the case of Gaols, the custody of which of right belongs, and is incident to, the office of sheriff, who must answer for excesses.

Mitton's case recognises, and was decided upon principles directly applicable to the case of the *custos rotulorum*; for it does not appear, either from the argument of counsel or from the judgment of the Court, that the right of the sheriff, although a very ancient officer existing before the conquest, was founded on prescription, but on the fact of his being the actual keeper of the rolls and entries of the Court for which he was responsible; and when it is remembered that the sheriff exercised a criminal jurisdiction, the sheriff's clerk might with propriety be considered as much the attorney-general of the king in joining issues for the crown as the clerk of the peace.

In addition to those cases of the clerk of assize and the clerk of the sheriff's court, which appear to be strictly analogous, I would mention the *exigenter's* case, *Scroggs v. Coleshill*, for the principle on which it was decided; viz. that the title of Coleshill was null, and that the gift of the office at no time belonged to the queen, but was at the disposal of the Chief Justice for the time being, as an inseparable incident belonging to him, and this by reason of prescription and usage. In 1558, *Queen Mary, during the vacancy of the office of *exigenter* [78 and of Chief Justice of the Common Bench, granted the *exigenter's* office by patent to Coleshill: she afterwards, by patent of same date, granted the office of Chief Justice to Browne, who refused to admit Coleshill, and appointed Scroggs. Sir Nicholas Bacon was commanded by the queen to examine the right and title of Coleshill, and to report. He convened all the Judges of the Queen's Bench—Saunders, Chief Baron, Gerard, Attorney-General, and Caril, attorney of the duchy (all the judges of the Common Pleas excluded)—who took a clear resolution that the title of Coleshill was null, and that the gift of the office at no time belonged to the queen, but was at the disposal of the Chief Justice for the time being, as an inseparable incident belonging to the said Chief Justice; and this by reason of prescription and usage. Dyer, after describing the words of the statute of Westminster 2d, *habeant de cætero omnia placita coram eis*, concludes with these words: "and so it seems in reason that the justices were before the clerks, and made clerks at their pleasure."

To this may be added, also, the case of *Bridgman and Holt*, in Shower's Parliamentary Cases, 111, where the question was, Whether the office of clerk of pleas in King's Bench was grantable by the crown, or belonged to the Chief Justice, and was grantable by him? This officer was to enrol pleas between party and party only, having nothing to do with any pleas of the crown. All the rolls and records in this office were in the custody of the Chief Justice. All writs to certify and remove the records were directed to the Chief Justice. From the nature of the employment, it was insisted, that in truth he was but the Chief Justice's clerk; and, further, it was shown that for 235 years, the office when void had been granted by the Chief Justice, and enjoyed accordingly under such grants. And that in those *grants were introduced these words, after [79 the mention of the surrender to the Chief Justice:—"To whom of right it doth belong to grant that office whensoever it shall be void." This declaration by the party claiming to appoint is weak when compared with the strong legislative recital of the right of the *custos* to appoint in the preamble of the statute of 37 H. 8.

In addition to these authorities, the case of *Harcourt v. Fox*, to which I already have had frequent occasion to refer, should never be lost sight of. It is true, the question there to be decided was, Whether, upon the construction of

the several acts of 37 H. 8, and the first of William and Mary, the office of clerk of the peace determined by the death or removal of the custos; or Whether, being appointed, he did not acquire under the statutes an interest *quamdū se bene gesserit*.

In the decision of that question, which arose within five years after the passing of the act, it became an essential part of the inquiry to ascertain the origin and nature of the respective offices of custos rotulorum and clerk of the peace. I cannot, therefore, consider the opinions delivered by Lord Holt, and the other Judges upon this branch of the subject as *obiter* and extrajudicial dicta, but bearing pertinently and directly on the point. And although it was insinuated that Lord Holt's mind had insensibly contracted a bias from his connection with one of the litigant parties in another cause unfavourable to the pure administration of justice, yet I am persuaded that his spotless integrity and high judicial character with the present age and with posterity will afford him an ample shield against so severe and undeserved an imputation.

The case of *Saunders v. Owen* followed soon afterwards, which establishes the same principles, according to the report of it in *Salkeld*, 467. The Court held that it always belonged to the custos rotulorum to *nominate the clerk of *30] the peace, but that he was removable whenever the custos was removed or changed; and, moreover, that he was removable at the will of the custos until 37 Hen. 8, which continued him in office *quousque* the custos continued, so that he demeaned himself in his said office justly and honestly.

The point there for decision was, whether the nomination by parol was sufficient, or whether it required an appointment by deed. But I am not aware, although the same case is more fully reported by Lord Raymond, that there was any dissatisfaction expressed at the decision of Lord Holt in *Harcourt v. Fox*, afterwards affirmed in the House of Lords; and under these circumstances, my Lords, after a careful examination of the origin (as far as I have been able to trace it) of the respective offices of custos rotulorum and clerk of the peace, and of their duties, as arising out of and connected with the commission of the peace; from the legislative declaration and recognition of the right of the custos rotulorum to appoint, which, as it appears to me, is to be found on the rolls of parliament, statute 37 Hen. 8; and from the accumulated weight and authority of the cases to which I have referred as analogous, and the principles to be extracted from them, my mind (with great deference to the opinion of others from whom it may be my misfortune to differ) has arrived at the conclusion that the appointment of the office of the clerk of the peace within the shires of England did by law, previously to the passing of the act of 37 Hen. 7, belong of right to the custos rotulorum of the shire by virtue of his said office.

My Lords, to the second question propounded by your Lordships, Whether the appointment to the office of clerk of the peace within the shires of Ireland did by law, in and previously to the year 1800, belong of right to the crown or *81] to the custos rotulorum of the shire by *virtue of his said office, or to any and what other person or persons? I answer, that I conceive it to have belonged of right to the custos rotulorum of the shire by virtue of his office. Your Lordships are aware that as early as the reign of King John, a regular code or charter of English laws was granted by that monarch about the twelfth year of his reign, and deposited in the Exchequer of Dublin, under the King's seal, for the common benefit of the land (as the public records express it), that is, for the common benefit of all who should acknowledge allegiance to the crown. And for the regular and effectual execution of those laws, the King's four courts of judicature were established upon the model of the four superior courts in England, and a new and more ample division was then made of the King's lands of Ireland into counties, in which sheriffs and other officers were appointed, in accordance with the system of government prevailing in England. If then the office of clerk of the peace was incident to the office of custos rotulorum in England, it seems to me to follow as a necessary natural consequence that the same rule must hold in Ireland, the nature of those several offices, and the duties

required in relation to them, being the same in both countries. The various Irish acts of parliament referred to, 13 & 14 G. 3, c. 26, 23 & 24 G. 3, c. 39, 40, 35 G. 3, c. 29, 36 G. 3, c. 25, 40 G. 3, c. 80, directing documents to be deposited by the clerks of the peace among the records of their respective counties, and requiring them to give attested copies, appear to me strong legislative recognitions that the appointment of the office of clerk of the peace in Ireland is incidental to the office of custos. The act passed so recently as 1 G. 4, c. 27, which gives the clerk of the peace right to hold the office *quamdiu se bene gesserit*, shows that before that time the appointment of clerk of the peace was determined by the death *or removal of the custos who appointed, and, [†82 therefore furnishes a strong inference that the appointment of clerk of the peace in Ireland was by law incidental to the office of custos before the Union.

By the cases also which have been decided in Ireland, of *The King v. Ferguson* and *The King v. Severney and Falkiner*, this seems to have been received, declared, and acted upon, as the law of that country.

To the third question, whether the right to appoint to the office of clerk of the peace within the King's County in Ireland, did, by law, in and previously to the year 1800, belong to the crown or the custos rotulorum of the said shire, by virtue of his said office, or to any and what other person or persons; I also answer that the right to appoint to the office of clerk of the peace within the King's County in Ireland, did, by law, in and previously to the year 1800, belong to the custos rotulorum of the said shire, by virtue of his said office.

The frame of this question, has not failed to draw my attention to the consideration of any distinction which the historical fact, that the King's County was not formed into a county until the third and fourth year of the reign of Philip and Mary, in the year 1556, might naturally suggest.

I do not, however, apprehend that this circumstance can in any manner vary the question, having taken occasion to state in the most distinct and unqualified terms, that neither in England nor in Ireland can the right of the custos to nominate the clerk of the peace be maintained upon the ground of prescription, the office of custos rotulorum and of clerk of the peace in both countries, and the very county also in Ireland to which this question more directly applies, being each and every of them created and existing only within the time of legal memory.

But the moment in which the King's County became a county, however recent its formation, I conceive that *the right to appoint a clerk of the peace, upon the principle and for the reasons I have before stated, as applicable to England, became *eo instanti* indispensably incidental to the office of custos rotulorum in Ireland, there being no provisions in the statute of Philip and Mary to alter the law in this respect. [†83

Being formed upon the model of other counties, with similar officers, such as custos rotulorum, sheriffs, &c., their appointment would be regulated and controlled by the same laws which prevailed in the government of those counties.

When in the reign of Henry VIII. the shire of Monmouth was created by a severance and division of the lordships and marches within the country or dominion of Wales, and by an union and annexation of certain portions of them thenceforth by legislative enactment, became part and member of the new shire of Monmouth, with a custos, sheriff, and other officers, I conceive that to the sheriff belonged the right of appointing the shire clerk of the county court, and to the custos rotulorum the right of appointing the clerk of the peace as incidental to his office, in the same manner as in the most ancient counties in this realm.

Conceiving, therefore, the decision of this last question to depend upon the same principles in the explanation and development of which I fear that I have drawn but too largely upon your Lordships' patient attention in my discussing the merits of the first question, I conclude with expressing my humble opinion that the right to appoint to the office of clerk of the peace within the King's

County in Ireland, did, by law, in and previously to the year 1800, belong to the *custos rotulorum* of the said shire, by virtue of his said office.

The other judges concurred in the opinions delivered by Littledale, J., Gaselee, J., and Vaughan, B., and upon a subsequent day judgment was given as follows by the

*84] ***LORD CHANCELLOR.** My Lords, there is a case of *Harding v. Pollock*, which is a writ of error from the Court of Exchequer Chamber in Ireland. The question relates to the appointment of the clerk of the peace in the King's County in Ireland. It was contended on the one side, that the appointment of the clerk of the peace of the King's County in Ireland was in the crown; on the other hand it was contended, that it belonged to the *custos rotulorum* of the county. The Court of Exchequer Chamber in Ireland was of opinion that the appointment belonged to the crown.

A writ of error was brought, and it was argued in your Lordships' House during the last session of parliament. It was a case of great importance, and all the Judges were assembled for the purpose of hearing the arguments, in order that your Lordships might have the benefit of their advice and assistance with respect to the subject.

The learned Judges differed in opinion, and they postponed, therefore, delivering their judgments till the present session; that difference still continued; a great majority of the Judges, however, were of opinion, that the right to that appointment was in the *custos rotulorum* of the King's County, one single Judge dissenting. The opinions of the learned Judges were delivered at great length in your Lordships' House. I had an opportunity of attending to their reasonings at the time. I have since been favoured with copies of their judgments, and have had an opportunity of again considering them; and, without troubling your Lordships by going over the same arguments which have been already advanced upon the subject in great detail, it may be sufficient for me to state that I am satisfied that the decision of the Court below was erroneous, and that the appointment of this office is not in the crown, but in the *custos rotulorum*: *85] and I am of that opinion upon the authorities that were cited by the learned Judges by which they fortified their opinion, and by the reasonings which they employed in support of their opinion. I should, therefore, propose to your Lordships that the judgment of the Court below be reversed.

Judgment reversed.

MILLS v. A. COLLETT, Clerk. June 22.

Defendant, as a magistrate, committed to prison as a felon, the plaintiff, against whom a charge had been made of maliciously cutting down a tree on premises in his occupation, the property of A. B.: Held, that defendant was not liable to an action.

TRESPASS for assault and imprisonment. Plea, not guilty.

At the trial before Vaughan, B., Suffolk Spring assizes, it appeared that the plaintiff had been brought before the defendant, a magistrate for the county of Suffolk, on a charge of maliciously cutting down a tree; and the following depositions were taken by the magistrate's clerk:—

Suffolk to wit.—“The deposition of Robert Balls, wheelwright, of the parish of Cheddiston, in the county of Suffolk, taken and made upon oath before us, two of his majesty's justices of the peace for the said county, this eighteenth day of October, in the year of our lord one thousand eight hundred and twenty-seven, who saith that he knows the certain elm timber tree cut down by Simon Mills of Cheddiston aforesaid, farmer, and Abraham Stannard, of the parish of Saint James Southelmham, labourer, on the premises of the said Simon Mills, and that it is worth more than one pound sterling.

Before us

“L. R. BROWN,
“A. COLLETT.”

“ROBERT BALLS.”

*Suffolk to wit.—“The deposition of John Storkey, husbandman, of the parish of Linstead Parva, in the county of Suffolk, taken and made upon [*86 oath before us, two of his majesty’s justices of the peace for the said county, this eighteenth day of October, in the year of our lord one thousand eight hundred and twenty-seven, who saith, that on Monday last, the fifteenth day of the present month of October, on the premises occupied by Simon Mills in the parish of Cheddiston, in the said county, the property of John Badeley, doctor of physic, namely, in the yard adjoining and belonging to the dwelling-house of the said premises, he saw Simon Mills of Cheddiston, aforesaid, and Abraham Stannard, labourer, of the parish of Saint James Southelm, wilfully and maliciously cutting, breaking, barking, rooting up, and otherwise destroying, a certain timber elm tree, the property of the said John Badeley.

Before us

“JOHN STORKEY ✕ his mark.”

“L. R. BROWN,

“A. COLLETT.”

And that the defendant thereupon committed the plaintiff for a felony to the county gaol, where he lay among felons for three months, till the ensuing Epiphany sessions, when, a compromise having been entered into between him and the prosecutor, he was discharged upon application to the court.

On the part of the defendant it was contended, that for aught that appeared on the depositions, the plaintiff might have been properly committed under 7 & 8 G. 4, c. 30, s. 19; but that, at all events, as there was no proof of malice, the defendant could only be charged with an error in judgment, for which he was not liable in an action.

The learned baron, being of this opinion, directed a nonsuit. An objection was taken to the notice of action, *in which the residence of the plaintiff’s [*87 attorney was stated to be in Half Moon Street, Piccadilly, London.

Storke, Serjt., obtained a rule *nisi* to set aside the nonsuit, on the ground that the tree being stated in the depositions to have stood on premises occupied by the plaintiff, it must have been plain to the defendant that the plaintiff could not commit a trespass, much less a felony, by cutting it down. The defendant, therefore, having acted without jurisdiction, and even without colourable cause, was liable in trespass.

Wilde and Russell, Serjts., showed cause.

There are two questions in this case, First, Whether there has been on the part of the defendant any error of judgment, any misconstruction of the act 7 & 8 G. 4, c. 30. By that statute it is enacted, sect. 19, “If any person shall unlawfully or maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of 1*l*.) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any time not exceeding two years, and if a male, to be once, twice, or thrice privately or publicly whipped (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully or maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (*in [*88 case the amount of the injury done shall exceed the sum of 5*l*.) shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned.”

This provision was substituted for the black act, 9, G. 1, c. 22, s. 1, which made the offence capital where the malice was personal to the owner; and the 6 G. 8, c. 80. and 6 G. 8, c. 48, by the first of which, the offence, if done in the night time, was felony; and by the second, if done at any other time, was punishable by summary conviction for the first and second offences. It would be difficult

to say why the present case is not clearly within the new statute. The word maliciously can scarcely be said to bear a signification, other than that which it had under the statute 6 G. 3, c. 36, upon which it was considered as bearing its most general signification, and as applying to an act done *malò animò*, from an unjust desire of gain, or a careless indifference of mischief: 2 East, P. C. 1062. Malice, in a legal sense, does not signify according to its common acceptance desire of revenge, or a settled anger against a particular person. And the statute does not limit the offence to the cutting down trees on the premises of persons other than the offender. It nowhere appears what interest the plaintiff had in the premises on which he cut the tree; but even if there were an existing tenancy, felony may be committed in respect of demised property; as in arson, under the statutes (though not at common law), and in larceny of chattels and fixtures let to tenants and lodgers by 7 & 8 G. 4, c. 29, s. 45. Suppose valuable or ornamental trees,—as an avenue,—to have been cut down maliciously by an occupier, *89] might he not be punished under this statute? There was enough, *therefore, in the case for a magistrate to suppose that he had jurisdiction to commit for trial, and it was not for him to decide the law.

But, secondly, even if there were an error in judgment, the magistrate is not liable to an action. 3 Hawk. P. C. c. 8, s. 74. "Justices of the peace are not punishable *civily* for acts done by them in their *judicial* capacities; but if they abuse the authority with which they are intrusted, they may be punished criminally at the suit of the king, by way of information. But in cases where they proceed *ministerially* rather than *judicially*, if they act *corruptly* they are liable to an action at the suit of the party, as well as to an information at the suit of the king." Again, in 3 Hawk. P. C. c. 13, s. 20, "Perhaps there may be this difference between the warrant of a justice of the peace, for such causes which he has not authority to hear and determine as judge without the concurrence of others, and such warrant for an offence which he may so determine without the concurrence of any other; that in the former case, inasmuch as he rather proceeds ministerially than judicially, if he act *corruptly* he is liable to an action at the suit of the party, as well as to an information at the suit of the king; but in the latter case he is punishable only at the suit of the king, for that regularly no man is liable to an action for what he doth as judge."

In *Windham v. Clere*, Cro. Elis. 130, 1 Leon. 187, S. C., an action on the case was brought against the defendant as a justice, for maliciously issuing his warrant, in which it was alleged that plaintiff was accused of stealing a horse, *ubi reverà* plaintiff never was accused nor did steal the horse, and defendant knew him to be guiltless. The plaintiff had a verdict, and Clench and Gawdy say, "If a man be *accused* to a justice of the peace of an offence for which *90] *he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable; but if the party be *never accused*, but the justice of his malice and his own head cause him to be arrested it is otherwise."

And *Morgan v. Hughes*, 2 T. R. 225, is an authority, that where a justice maliciously grants a warrant against a person *without* an information, upon a supposed charge of felony, an action of trespass will lie. But no case can be found where such action has been attempted without imputation of corrupt motive or malice; and in *Lowther v. Lord Radnor*, 8 East, 113, it was held that trespass does not lie against justices acting upon a complaint made to them upon oath, by the terms of which they had no jurisdiction, though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time.

Thirdly, with respect to the notice, *Steers v. Smith*, 6 Esp. 138, is a conclusive authority in support of the objection. In that case the notice described the plaintiff's attorney as of New Inn, London, instead of New Inn, Westminster, and Lord Ellenborough held that it was insufficient. Piccadilly can as little be said to be within what is properly called London as New Inn. [PARK, J. If I were to address a letter to the learned counsel, meaning it to find him, should I write "Gower Street, Middlesex?"] A very strict construction has always

been given in favour of magistrates, to the statute requiring the notice of action. *Taylor v. Fenwick*, cited by Lawrence, J., in *Lovelace v. Curry*, 7 T. R. 631, and *Aked v. Stocks*, 4 Bingh. 509.

Storks. It may be admitted that where a magistrate has jurisdiction he is not liable to an action unless corrupt motive or malice be proved.

*In the present case the defendant had no jurisdiction, and he must have known that he had none, because it appears on the face of the depositions, which are not in the language of witnesses, but framed by the defendant's clerk in the precise terms of the act, that the plaintiff cut the tree on premises in his own occupation. He had not committed so much as a trespass, and for aught that appeared might have been in the exercise of a right, since most occupiers are entitled to cut wood for *house-bote*. [91]

In *Crepps v. Durden*, Cowp. 640, a magistrate was holden liable in trespass for merely exceeding his jurisdiction; *a fortiori* he is liable, where he acts without jurisdiction. In *Davis v. Capper* (Gloucester Summer assizes, 1828) the plaintiff, a respectable female, sued the defendant, a magistrate, for committing her to prison for fourteen days, on a charge of theft of which she was innocent. The learned Judge who presided having directed a nonsuit, the Court of King's Bench awarded a new trial.^(a)

With respect to the sufficiency of the notice, *Steers v. Smith* is only a *vis prius* decision. It never could have been the intention of the legislature that courts of justice should descend to a paltry quibble, for the purpose of screening magistrates from the consequences of misconduct. The object of the statute was, that the magistrate should, with a view to tendering amends, if necessary, have effectual notice of the residence of the plaintiff's attorney. For the purpose of useful information, Piccadilly, London, is a more instructive address than Piccadilly, Middlesex.

*TINDAL, C. J. I am of opinion that the rule ought to be discharged. This is an action in which a magistrate is charged with trespass and false imprisonment for committing the plaintiff to prison for trial, and the only question is, whether the magistrate had jurisdiction to investigate and commit. The information charges an offence within the statute 7 & 8 G. 4, c. 30, as a felony, and the question is, whether a charge being made of a distinct felony, the magistrate is answerable for the correctness of the charge if the case be disposed of as in other cases, where a magistrate is called upon to act. It would be most dangerous if he were holden to be liable in such a case. The act gives the magistrate no power to convict, but merely to sanction the commitment for trial. And in *Sir Edward Clere's case*, Cro. El. 130, it was said, "If a man be accused to a justice of peace of an offence for which he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable." Undoubtedly it was not correct to take the depositions in the precise words of the act, because such could not have been the language of the witnesses; but that alone will not make the defendant's conduct malicious. I cannot accede to the proposition, that the circumstance of a party's being the occupier of the premises on which the tree is cut, necessarily takes a case out of the statute. Suppose the trees excepted in a lease, the tenant would be a trespasser; and if liable in trespass, I am not prepared to say he might not be liable criminally. But that is not the ground of my decision. If a party charged with an offence be brought before a magistrate, he must exercise a judgment on the case, and he is not liable for a mere error of judgment. In *Crepps v. Durden*, the magistrate, having once convicted, had no jurisdiction; he was *functus officio*. In the present case he had jurisdiction. I give no opinion on the other point. The rule must be discharged. [92]

PARK, J. I am of the same opinion. If when a charge is before him a magistrate does not exceed his jurisdiction, he is not liable to an action. In *Crepps v. Durden* he was *functus officio*. I reprobate the framing depositions in

(a) See the circumstances of the case in *Davis v. Russell*, 5 Bingh. 354. Upon the new trial, a special jury awarded the plaintiff 10*l.* damages.

the words of acts of parliament, but that does not render the magistrate liable. The rule must be discharged.

BURROUGH, J. If the magistrate has jurisdiction, as he had here, he never can be liable in an action of trespass, nor in any form of action for a mere mistake in a matter of law; and whether an occupier could commit a felony under the statute on his own premises, was clearly a matter of law. The depositions ought not to have been taken in the terms of the act of parliament. That is not the language of witnesses. But even if the magistrate were answerable for the misconduct of his clerk, trespass is not the form of action. I agree in the rule being discharged.

GASELER, J. I am sorry to agree in the opinion that the action cannot be maintained: but the law is so. The language of the statute under which the plaintiff was committed, is general, and contains no exception of malicious injuries done by occupiers against their lessors. But independently of that, the defendant acted on his general authority; and if there were a probability of a felony having been committed, he was bound to proceed as in other cases. Suppose a committal on suspicion of murder, and it turns out not to be murder, shall the *94] magistrate be liable? In *Crepps v. Durden* the *magistrate had power not merely to inquire but to convict, and having convicted his jurisdiction ceased. Here the defendant had jurisdiction, and the rule must be

Discharged.

GORING *v.* EDMONDS the Elder. *June 23.*

In April 1825, defendant guaranteed the payment of money due from his son to the plaintiff upon a sale of timber. The plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till December 1827, when the son became bankrupt. The plaintiff never disclosed to the defendant the issue of these applications, but in December 1827 sued him on his guarantee: Held, that the defendant was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son.

ASSUMPSIT on the guarantee at the foot of the following agreement, which had been entered into by the defendant's son.

"Agreement between Charles Goring, Esquire, and Thomas Edmonds, jun. I, Thomas Edmonds, at Steyning, agree to purchase so many oak trees as are marked, and shall be marked by us at Olbourne and East Grinstead, at the price of 10*l.* per load, girth measure of fifty feet by the load. But should Mr. Markwick, when he measures the same, consider the sum of 10*l.* per load not a sufficient price, he is to fix such price as he considers it to be worth. And I hereby agree to pay the price he shall fix upon, though it shall exceed 10*l.* per load. And, further, I agree not to remove the timber or bark without the consent in writing of Charles Goring, Esq., from off the said estates where the said timber shall be cut; and whatever securities I may give to Charles Goring, Esq., to induce him to consent to the timber and bark being taken away, shall be taken up and discharged, half at Michaelmas, and the other half at Christmas next at farthest.

"THOMAS EDMONDS."

*95] "In the event of my son Thomas Edmonds, jun., not paying Charles Goring, Esq., I hold myself liable, and hereby engage to fulfil the said payments according to the above conditions.

"THOMAS EDMONDS.

"April 20, 1825."

At the trial before Tindal, C. J., Middlesex sittings after Easter term, it appeared, that the defendant and his son having signed the foregoing instrument in April 1825, the timber was all removed by Edmonds the younger, without any further security being required. On the 19th December, 1825, two bills for 200*l.* each, drawn by Edmonds the younger on one Alexander, and accepted by him, were paid into the plaintiff's bankers. These bills were duly honoured in March 1826. There remained then due to the plaintiff in respect of the timber 48*l.* 16*s.* From that time to the close of 1827, repeated applications were

made in vain to Edmonds the younger for payment. On the 1st of October, 1827, Edmonds the younger gave the plaintiff a bill for 200*l.* drawn by him on one Williams, which became due, and was dishonoured early in December 1827. The plaintiff, however, never returned it, nor gave any notice of dishonour. About that time Edmonds the younger became bankrupt, and the plaintiff, through his attorney, applied for the first time to the defendant upon his guarantee, for payment of the 486*l.* 16*s.* The defendant admitted his liability, but was not aware of the bill accepted by Williams.

On the part of the defendant it was contended, at the trial, that his liability was discharged by the plaintiff having taken bills from the son, and by his not having earlier communicated to the defendant the state of the account. *Payne v. Ives*, 3 D. & R. 664, was relied on.

*For the plaintiff it was insisted, that as there was a fixed day for payment, there had been no unreasonable delay in applying to the defendant. [*96 The Chief Justice told the jury, that in order to discharge the defendant, time must have been given, under such circumstances, that the plaintiff must have lost his remedy against the original debtor; and he observed on the admission of liability made by the defendant himself.

A verdict having been found for the plaintiff, damages 486*l.* 16*s.*,

Russell, Serjt., moved to set it aside, on the ground of a misdirection, or to reduce the damages by 200*l.*

The defendant was discharged by the plaintiff's dealings with the principal debtor. In *Peel v. Tatlock*, 1 B. & P. 419, it was considered by the Court, that delay in calling upon a guarantee does not exonerate him, unless it can be shown or presumed that he is a loser thereby. But here the defendant might well be presumed to be a loser. Two years, during which the principal creditor was in good credit, the guarantee was never called on. He was applied to only when the failure of his principal deprived him of any chance of being reimbursed.

In *Payne v. Ives and Others*, 3 D. & R. 664, the defendants gave the following guarantee:—"We undertake to endorse any bill or bills Mr. John Stubbs may give to Messrs. Payne & Co. in part payment of an order for lace which is now being executed for him. Messrs. Payne & Co. to allow 5 per cent. on the amount of the said bills for the said guarantee." Stubbs paid the plaintiffs part of the amount in money, viz. 500*l.*, and gave them a bill for the remainder, viz. 337*l.* at eighteen months, and the plaintiffs kept the bill for seventeen months and *ten days; and then, finding that Stubbs was insolvent, applied for [*97 the first time to the defendants *Ives & Co.* for their endorsement. And it was held, that the plaintiffs were concluded by their laches, and that the defendants were not liable on their guarantee. *Abbott, C. J.*, said, "The general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. - But for the plaintiffs to forbear their demand for seventeen months out of eighteen, was neither reasonable nor convenient. Besides, here the plaintiffs lie by till they learn that Stubbs is insolvent, and until they discover that the endorsement is the only means by which they can secure their debt; and, but for that discovery, they probably never would have applied at all. That, I think, they were not entitled to do under the agreement, and consequently, they ought not to have recovered in this action." And *Bayley, J.*, said, "The option given to the plaintiffs ought to have been made in a reasonable time, and, at any rate, before that event occurred, of which, if the defendants had known, they never would have given the guarantee." *Holroyd, J.*, said, "The plaintiffs did not exercise their option till within a few days of the bill becoming due, and till they knew of the insolvency of the acceptor. I think they were not justified in such delay, and that is the only question in the cause. With respect to bonds, it is laid down by Lord Chief Baron Comyns, that where a condition is to do a transitory thing without limiting the time, it ought to be done immediately, that is, in a convenient time."

As to the 200*l.* bill, by keeping it and giving no notice, it is quite clear that

the plaintiff made it his own. The death, bankruptcy, or known insolvency^(a) of the drawer, or his being in prison,^(b) constitute no *excuses either at law *98] or in equity for the neglect to give due notice of non-acceptance or non-payment; and the reason is, that many means may remain of obtaining payment by the aid of friends or otherwise, of which it is reasonable that the drawer and endorsers should have the opportunity of availing themselves; and it is not competent to the holders to show that the delay in giving notice has not in fact been prejudicial: *Esdale v. Sowerby*, 11 East, 114.

Besides, the taking the bill was a discharge; at least *pro tanto*; as giving time for an hour discharges the surety. Defendant's acknowledgment could not affect his rights, when made in ignorance of the circumstances. In the case of a bill of exchange, a promise to pay, by an endorser or other party, if made without a knowledge of the laches of the holder in respect of such bill, will not be binding. *Blesard v. Hirst* and another, Burr. 2670, *Goodall and Others v. Dolley*, 1 T. R. 712.

In this last case a bill drawn in favour of defendant, payable 11th January, 1787, was presented for acceptance by the plaintiffs on the 8th November, 1786, when acceptance was refused; they gave no notice to the defendant till the 6th January, 1787, and then they did not say when the bill was presented. The defendant proposed paying by instalments, which offer was rejected by the plaintiffs, and they brought the action. Heath, J., ruled that the defendant was discharged for want of notice, and that his offer to pay being made in ignorance of the circumstances, was not binding: the jury found a verdict for the defendant, and upon cause shown against a rule for a new trial, the Court held the direction and the verdict right.

TINDAL, C. J. This is not a case for a new trial. There are two points on which it is suggested the jury have been misdirected. The first, that mere *99] laches in *the party secured will operate as a discharge to the surety: but no case goes to that extent, and there are many which establish the reverse. I am far from saying, there may not be an extreme case of laches amounting to fraud, and fraud would be a defence to the action; but not mere negligence. In *Trent Navigation Company v. Harley*, 10 East, 34, the obligees in a bond conditioned for the principal obligor to account for and pay over tolls, did not examine his accounts for eight or nine years, and did not call for payment so soon as they might have done; but they obtained a verdict in their favour; and on a motion for a new trial, Lord Ellenborough said, "The only question is, Whether the laches of the obligees in not calling on the principal so soon as they might have done, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity." The case of *Payne v. Ives* was on an executory promise to endorse in future any bills Stubbs might give in payment for lace, and no application was made to the defendants till nearly eighteen months after the bill was given. That might so alter the state of things as to be too late in an executory contract. But that will not govern the case of a guarantee. The second objection is, that the mere giving of time on the bill would discharge the defendant: but in *English v. Darley*, 2 B. & P. 61, it was held, that merely giving time, without an engagement to suspend the usual remedies, will not discharge the surety. The point here was left to the jury upon the material question, whether time had been given under such circumstances; and it appeared to me that they found correctly.

PARK, J. I concur with my Lord Chief Justice. In the *London Assurance Company v. Buckle*, 4 B. Moore, 153, which was *an action of debt on *100] a bond for 2000*l.* duly executed by an insurance broker as the principal obligor, and two sureties with a certain condition, it was held, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. I fully

(a) *Ruseel v. Langstaffe*, Dougl. 514. *Esdale v. Sowerby*, 11 East, 114.

(b) By Lord Alvanley, C. J., *Haynes v. Birks*, 3 Bos. & Pul. 601.

concur in the doctrine there laid down, and that case is stronger than the present.

BURROUGH, J. The direction to the jury cannot be impeached.

GASELEE, J. I think a surety has a duty upon him to go and inquire as to the state of the transaction. In *Orme v. Young*, 1 Holt, 84, there was delay in giving notice, and yet the surety was holden not to be discharged.

Rule refused.

HENLEY v. The Mayor and Corporation of LYME REGIS. *June 27.*

Where a verdict was taken by consent on two counts, the Court, on the application of the plaintiff, amended the posita, by entering the verdict on one (to which the evidence applied), although the Judge who presided at the trial declined to interfere.

THE declaration in this cause contained five counts. Two charging the defendants with the repair of sea walls, by virtue of a charter from the crown. Two by prescription; and one by virtue of possession.

At the trial before Littledale, J., Dorchester Summer assizes 1828, after the evidence on the part of the plaintiff had been heard, the learned Judge expressed *an opinion that he must fail on the three last counts, and it was then agreed by the counsel on both sides to enter a verdict on the two first [*101 counts, which charged the defendants under their charter. The jury were discharged as to the other counts.

The first of these two counts (see them, 5 Bing. 91), set out the charter fully, alleged the possession of the defendants under it, and the liability to repair as consequent on possession under the charter.

The second set out less of the charter, omitted any allegation of possession, and laid the liability as consequent on the charter.

The defendants moved in arrest of judgment, and the decision of the Court having been in favour of the plaintiff on the first two counts, an application was made to Littledale, J., to permit the verdict to be entered on the first count only. The learned Judge declined to interfere, on the ground that the verdict had been entered on the first two counts by consent, but he transmitted to this Court his notes of the trial.

Wilde, Serjt., moved for a rule to show cause why the verdict should not be entered upon the first count alone.

He contended, that such entries were always made by the authority of the Court, although it was usual to apply to the Judge who presided at the trial for his concurrence, as he was the best acquainted with the evidence in the cause; but the rule was, that where the same cause of action was declared on in various counts, the verdict might be entered on any of them to which the evidence applied; and it was manifest here, that no evidence could have been given under the second count which did not equally apply to the first. The agreement at the trial was not restrictive of the right to enter the verdict on a single count, but restrictive only of the *number of counts on which the plaintiff should have that privilege. The object of that agreement was to confine [*102 the argument on the contested question of law to some count which was borne out by the evidence; not to pin the plaintiff to all the counts on which he might have offered evidence, for the purpose of entrapping him in some technical informality.

The following authorities were cited, to show that the authority to apply the verdict to a particular count was in the Court, and not in the Judge who happened to preside at the trial. *Eliot v. Skyppe*, Cro. Car. 838; *Hankey v. Smith*, Barnes, 449; *Newcomb v. Green*, 2 Str. 1197, 1 Wils. 33; *Spencer v. Goter*, 1 H. Bl. 78; *Petrie v. Hannay*, 3 T. R. 659; *Williams v. Breedon*, 1 B. & P. 820.

Tuddy and Morewether, Serjts., who showed cause, did not deny the rule to be

as stated, or the authority of the cases cited, but asserted that there was no case in which the entry had been made without the concurrence of the Judge who presided at the trial; and that in none of the cases cited had there been any agreement by the parties to take the verdict on particular counts. That agreement was conclusive between them, and the Court had no authority to interfere.

In *Richardson v. Mellish*, 3 Bingh. 334, the Court would not act without the concurrence of the Judge who had tried the cause, and required a certificate from him, although he had quitted the Court.

Where the case arises on a contract, the cause of action may often be single; but where it arises on a tort, if there be any evidence which applies to an insufficient count, the *postea* cannot be amended: *Eddowes v. Hopkins*, Dougl. 376.

*103] *Wilde*. The cause of action on these two counts is clearly the same, namely, the defendant's liability under the charter. The case, therefore, does not admit of comparison with ordinary actions on a tort. The plaintiff is not only entitled to confine his verdict to a single count where the evidence admits of it, but he may be compelled to do so: *Lee v. Muggridge*, 5 Taunt. 36.

The court being called into the Exchequer Chamber, the case stood over till this day, when

TINDAL, C. J., said, The plaintiff in this cause has made an application to enter the verdict on the first count of the declaration only, although, by consent, the verdict was taken on the two charter counts. Looking at the agreement between the parties, we think we shall carry it into effect by allowing the plaintiff to enter his verdict on the first count. If, indeed, damages could have been given on the second count which could not have been given on the first, we should not do what is requested, without the concurrence of the Judge who tried the cause: but looking at the two counts, we perceive that the cause of action in both is the same; the charters set out are the same; and the damages given must have been on the same account. The two counts are only different modes of stating the same cause of action. We give effect, therefore, to the agreement, by allowing the plaintiff to enter up his verdict on that count which he thinks states his cause of action the best. If we were to refuse the application, and a *venire de novo* were to be awarded upon a writ of error, we should only occasion unnecessary expense.

Rule absolute.

*104] *PHILPOTT v. DOBBINSON. June 29.

Avowry for rent due from plaintiff, as tenant of premises to avowant, under a demise before then made, at the yearly rent of 170*l*. :

Held, not supported by a proof of a conveyance to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them.

REPLEVIN for goods. The defendant made cognisance, as bailiff of William George Tate, because the plaintiff, for three-quarters of a year next before the 24th of June, 1828, and from thence until and at the time when, &c., enjoyed the dwelling-house, in which, &c., as tenant thereof to the said Wm. Geo. Tate, by virtue of a demise thereof to him, the plaintiff, before then made, at the yearly rent of 170*l*., payable quarterly, and 12*7**l*. 10*s*. was due for three-quarters.

The plaintiff pleaded *non tenuit modo et formâ*, and *riens en arriere*.

At the trial before Tindal, C. J., Middlesex sittings after Easter term, it appeared that Wm. Geo. Tate claimed the rent as heir of Wm. Tate: and

That the plaintiff had come into possession under a lease granted by Joseph Bradney. Joseph Bradney devised the property to three trustees in trust to sell. After Bradney's death, the three trustees were parties to deeds of lease and release, bearing date the 30th and 31st of December, 1824, by which the property was conveyed to Wm. Tate; but these deeds were executed by two only of the three trustees.

It was objected, that this evidence did not support the cognisance which was for the rent of the entire property, whereas, under the above conveyance, Wm. Tate took only two-thirds, of which he was tenant in common with the trustees who had omitted to execute the deed. A verdict having been taken for the defendant, subject to the opinion of the Court on this point,

* *Wilde, Serjt.*, now moved for a rule nisi to set it aside on the foregoing objection. The defendant ought to have made cognisance for two-thirds of the rent only, otherwise the contract on which the plaintiff holds is not correctly described: *Brown v. Sayce*, 4, Taunt. 320. It is a clear rule of law, that tenants in common must sever in avowry, unless the rent reserved be an hawk, an horse, or the like, which cannot be severed, *Lit. s. 314, 317; Harrison v. Barnby*, 5 T. R. 246; *Pullen v. Palmer*, 8 Salk. 207; 2 Vin. Abr. 59; *Actions, Joinder*, c. 37. [*105]

A rule nisi having been granted,

Taddy and Merewether, Serjts., showed cause. No doubt a tenant in common must sever in avowry, and the defendant *has* severed by not making cognisance as bailiff to the other tenant in common; but since the statute 11 G. 2, c. 19, it is unnecessary for a landlord to set out his title with precision, as he must have done at common law: to remedy that inconvenience the statute was passed, and it is sufficient if his avowry be general, and true to a general intent. Such is the cognisance here; for it is true, generally, that the plaintiff held the premises at a rent of 170*l.* a year, and that he held as tenant to Tate, although Tate might be entitled to only two-thirds of the rent. It is not necessary that an avowry should have a greater degree of certainty than a declaration, and under an avowry for a whole year's rent a landlord may recover less, if less be due. In *Clotworthy v. Mitchell*, Winch. 49, judgment was given for the avowant, who had pleaded that the whole of a rent had descended to him, although, in fact, only a part had descended. In *Grills v. Manel*, Willes, 378, it was holden that the amount of the avowant's estate was not material, *provided there were a demise to justify the distress. *Pullen v. Palmer* was decided previously to 11 G. 2. In *Forty v. Imber*, 6 East, 434, the avowry alleged that the plaintiff had holden for two years, commencing with Christmas: it turned out that he had holden for a different time, ending at a different period. But Lord Ellenborough said, "It is unnecessary to revert to cases before the statute of 11 G. 2, c. 19, s. 22, which meant to relieve landlords from the difficulties which they before laboured under in making avowries for rent, and gives the avowry and cognisance in as general terms as possible; and there has been no case since that statute where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled to recover for so much rent as was due." So in *Hargrave v. Shewin*, 6 B. & C. 84, an avowry was deemed sufficient which averred that the plaintiff held four closes, although it turned out in proof that he held six. The *modo et forma*, therefore, is not a part of the matter in issue (*Hob. 73*), particularly since the statute. In *Page v. Chuck*, 10 B. Moore, 264, where in replevin the defendant avowed for rent in arrear for a dwelling-house with the appurtenances, and it appeared in evidence that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupations of other tenants, it was held to be no variance. [*106]

Wilde. The question on this avowry arises on the tenancy of the plaintiff, and not on the right of the defendant to rent; he cannot be said to have severed when he has made cognisance for a whole rent of 107*l.*, being entitled to no more than two-thirds; and though he may avow generally under the statute, he must avow truly, otherwise the judgment would be no bar to another *action. *Clotworthy v. Mitchell*, and *Hargrave v. Shewin*, turned altogether upon the issues raised, and not on the sufficiency of the avowry. [*107] In *Forty v. Imber*, the question was not as to the avowant's title, but merely as to the quantum due of rent undisputedly vested in him; and a landlord may always, under an avowry for a certain sum, prove a less sum to be due. In *Page v. Chuck*, the plaintiff had merely underlet part.

TINDAL, C. J. We think that, in this case, a verdict must be entered for the plaintiff. The issue which the defendant has failed to establish, is in the first plea in bar, where the plaintiff avers that he did not hold the premises in manner and form as the defendant has alleged; and though the words *modo et forma* do not embrace every part of the defendant's allegation, yet they have always been held to embrace the contract between the parties. If authority were requisite, *Brown v. Sayce* is a distinct authority to that point; and the question is, whether there is not here a distinct allegation, that the plaintiff's holding was at 170*l.* a year for the defendant's interest in the premises. The statute 11 G. 2, was never meant to relieve the avowant from stating truly, though generally, the contract between the parties. If this case had occurred before the statute, the defendant must have shown the devise of the property by Bradney to the three trustees; the conveyance to him by two of them; and the distress for two-thirds of the rent. Since the statute a shorter mode of avowing is permitted; but the allegations essential to the contract must still correspond with the fact. The defendant states that the plaintiff holds the premises as tenant to Tate at 170*l.* a year: that allegation he has failed to prove. If a second distress were made for the whole rent by the other trustee, how could the judgment in the present case be pleaded in bar, when the record nowhere *108] discloses what the precise interest of the defendant is, and what the extent of his contract with the plaintiff?

There is a variance between the contract alleged and the contract proved, and the verdict must therefore be entered for the plaintiff.

PARK, J. I am of the same opinion. Since the statute 11 G. 2, the landlord may avow generally; but what he does allege he must allege truly. Page v. Chuck has no analogy with the present case.

BURROUGH, J. Although the landlord may avow generally since the statute, he must prove his title to the rent as he alleges it.

Here he has alleged a title to the whole of the rent payable by the plaintiff, whereas he could only support his claim to two-thirds. The cognisance, therefore, is not supported by the proof, and none of the cases cited for the defendant have any bearing on the subject.

GASELER, J. The only difficulty I felt was occasioned by the case from Winch; but that turns on the form of the issue, which was, whether a devise was properly pleaded.

Here there is an allegation that the plaintiff held at a rent of 170*l.*, which means, payable to the party distraining; if not, an avowry is of no use. But the plaintiff did not hold as tenant of the whole to the defendant at a rent of 170*l.*, but as tenant of his two-thirds at a rent of 170*l.* for the whole.

Rule absolute.

*109]

*WILLIAM DAY v. STUART. July 1.

A bill void under the stock-jobbing act is available in the hands of a *bona fide* holder without notice.

ASSUMPSIT by the holder against the defendant, as the drawer and endorser of a bill of exchange for 81*l.* 17*s.* 6*d.*

At the trial before Tindal, C. J., London sittings in this term, the plaintiff having called a witness to prove that the bill was endorsed to him for value, the defence set up was, that this bill had been given by the acceptor to the drawer for the amount of differences in time bargains in the public funds, contrary to the form of the stock-jobbing acts; and that the plaintiff, through his uncle James Day, from whom he had taken the bill, was privy to this illegality. Of this, however, there was no clear evidence. An entry for the amount of the

bill in the acceptor's book was read in evidence, and was as follows :—"To differences in consols 311*l.* 17*s.* 6*d.*"

And a witness was called, who said, *differences* might mean differences in point of time.

The Chief Justice told the jury that *differences* might have a legal meaning, and that they were to determine whether the parties meant differences in point of time, or differences between stock bought and stock sold.

The jury having found for the plaintiff, *Taddy*, Serjt., moved to set aside the verdict, on the ground that the entry in the acceptor's book was sufficient to show that the bill was given for time differences; and if so, was absolutely void. [TINDAL, C. J. Supposing the fact to have been so, it was not shown that the holder had any notice of it; and *Edwards v. Dick*, 4 B. & A. 212, has decided that a bill, void to all intents and purposes, may be available in the hands of an endorsee without notice.]

*That was a case on the gaming laws. But in *Steers v. Lashley*, 6 T. R. 61, stock-jobbing was decided to be a good defence even against a *bonâ fide* holder. [*110]

TINDAL, C. J. I am not aware that, if the cause were heard again, a different direction could be given to the jury; and if the case of *Edwards v. Dick* had occurred to me at the trial, I must have charged them more unfavourably for the defendant than I did. The defendant had the benefit of the witness who stated that differences might mean differences in time; his credit went to the jury; but I am not prepared to go so far as to say that *differences* must necessarily mean *illegal* differences. I think a new trial ought not to be granted.

The rest of the Court concurring, the rule was

Refused.

ADAMS and Others v. BATESON. July 2.

It is a fatal variance to describe a bond, conditioned for payment by A., B., and C., as a bond conditioned for payment by A., B., and D., although the bond be several as well as joint, and the action be brought against A. severally, and he, with full knowledge of the alteration, have paid a part by instalment.

The plaintiff declared against Bateson alone, on a bond in the penal sum of 2000*l.*, subject to a condition, that if Bateson, Reay, and Robinson, any or either of them, should pay plaintiff 1000*l.* in manner and at the times therein mentioned, the bond should be void. Breach, that on a certain day 700*l.* parcel of the 1000*l.*, with interest, was due and payable from the defendant and Reay and Robinson, and had not been paid. *Per quod actio accrevit.*

Plea, *non est factum*. At the trial, London sittings after Michaelmas term 1828, by a special verdict it was found that the bond was a joint and several bond, *executed by Bateson, Reay, and one Hall. That the said bond, and the said condition, after the making, sealing, and delivery thereof [*111] by the said defendant, were, by the direction of one Machell (the borrower of the said sum of 1000*l.* in the said condition mentioned, and for the payment whereof the said bond was made and executed), altered and varied in this, that the words following, to wit, John Hall of Lancaster, spirit merchant, were erased out of the said bond, and the words following, to wit, Thomas Robinson of Liverpool, ship-broker and merchant, were substituted in lieu thereof; and also that the words following, to wit, John Hall, were erased out of the condition of the said bond and the words following, to wit, Thomas Robinson, were substituted in lieu thereof; to which said alterations the said plaintiffs assented, previously to the said alterations or any of them being made: and that the said bond, subject to the said condition so altered as aforesaid, was thereupon signed, sealed, and delivered, by the said Thomas Robinson, who was another and a different person from the said John Hall.

That the aforesaid substitution of the name of the said Thomas Robinson for

that of the said John Hall, in the said bond and the condition thereof, was made without the assent, knowledge, permission, or authority of the said defendant, and that he the said defendant had never re-executed the said bond.

That the said defendant, since the making of the said alteration in the said bond and condition, and with full knowledge thereof, had assented thereto, by acknowledging his liability to pay the said sum of 1000*l.*, with the said interest, in the said condition mentioned, and by the payment of certain of the instalments. And if upon the whole matter the Court should esteem it the bond of the defendant, they found for the plaintiff; if the Court should deem it otherwise, they found for the defendant.

*112] *The case was argued in Easter term, by *Taddy*, Serjt., for the plaintiffs, and *Stephen*, Serjt., for the defendant.

On the part of the plaintiffs it was contended, that as the defendant was severally liable, and declared against as such, the bond, as to this action, must be considered as his bond alone. If it were his bond alone, he could take no notice of any proceeding affecting another several obligor. As far as regarded the defendant, therefore, the bond was not avoided by any alteration which merely substituted one several obligor for another. The defendant's liability remained unchanged, and that was the principal test as to the materiality of alterations in deeds: if the defendant's liability were unchanged, the alteration, especially as having been made by a stranger, was immaterial, and the variance between the bond set out and that given in evidence was equally immaterial. That was the effect of all the authorities which had recently been reviewed and collected in *Hudson v. Revatt*, 5 Bingham, 368.(a) But, at all events, the defendant had recognized the alteration, and adopted the bond in its altered state by subsequent assent. The payment by instalments was proof that he had taken the benefit of the instrument, and if so, must incur the *onus*.

For the defendant, it was argued, that no assent except by deed could restore the validity of a deed avoided by alteration; that the materiality did not depend on the consequences, but on the kind of alteration; that this was an alteration of the condition, which was in fact an alteration of the contract; and the defendant might have seen reasons for consenting to be bound jointly and severally with *Reay* and *Robinson*, and for refusing to be so bound with *Reay* and *Hall*.

*113] *The materiality, therefore, of the variance upon *non est factum* was manifest: the defendant had executed a bond conditioned for payment by himself, *Reay*, and *Robinson*, and had not executed a bond conditioned for payment by himself, *Reay*, and *Hall*. But whether the alteration was material or not, it avoided the bond, because it was made with the privity of the obligee, and without the privity of the obligor: *Pigot's case*, 11 Rep. 27; *Bayless v. Dinely*, 3 M. & S. 477.

In reply it was argued, that there was no necessity for setting out the condition of the bond in the declaration, and that as the defendant's obligation was several, the effect of the condition, as far as regarded this action, was, several payment by him.

Cur. adv. vult.

The judgment of the Court was this day delivered by

PARK, J., who, after reading the pleadings and special verdict, proceeded,

Two points have been made on the part of the defendant: first, that the bond is avoided by the alteration that has been made; and, secondly, that there is a material variance between the condition set out and that which appears on the bond given in evidence. Our opinion on the second point renders it unnecessary to decide the first. The bond produced, so far from being a bond conditioned for payment by the three persons named in the declaration, is a bond for payment by three persons, one of whom is not named in the declaration. We confine our decision to this point. There must be Judgment for the defendant.

BEST, C. J., was not present at the argument.

(a) Having been so recently referred to, they are not repeated here; and the argument is much abridged, as the judgment of the Court turned exclusively on the variance.

*SIMONDS and LODOR v. HODGSON. July 8.

[*114]

The master of a brig bound himself and the brig for the repayment of money borrowed to repair her in a foreign port, with 12 per cent. bottomry premium, eight days after his arrival in London.

The lender effected an insurance on the risk, and in the policy described his interest to be on bottomry :

Held, that this was not bottomry, and that the misdescription was fatal.

THE first count of the declaration was as follows :—Whereas heretofore, to wit, on the 29th March, in the year of our Lord 1823, in parts beyond the seas, to wit, at Copenhagen, in the kingdom of Denmark, to wit, at London, one William Adams, then and there being commander of a certain schooner brig called the Clarence, of Bristol in Great Britain, according to the custom of merchants, made his certain writing obligatory or bottomry bond, sealed with the seal of the said William Adams ; which said writing obligatory the said plaintiffs now bring here into Court, the date whereof is the same day and year aforesaid, and the tenor as follows :—

“ I, the underwritten William Adams, commander of the schooner brig Clarence, of Bristol in Great Britain, lying in the harbour of Copenhagen, having on my passage from St. Petersburg to London had the misfortune to run the said schooner brig on shore upon Fosterbone Reef, Coast Sweden, where she received considerable damage, and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage ; to pay the charges and expenses attending the said repairs, unloading and reloading, and putting the said ship in a state to proceed on her voyage, being loaded with a cargo of tallow, &c., I have borrowed and received from Messrs. Belfour, Ellah, and Rainalls, and Co., of Elsinour, the sum of 1077*l.* 17*s.* 9*d.* sterling, to pay for the above-mentioned repairs, together with labourage, commissions, and other adherent expenses proceeding from the said *misfortune, without which [*115] having been paid and done the said schooner brig could not proceed on her destined voyage to London ; and having received in hand the above-mentioned sum of 1077*l.* 17*s.* 9*d.* sterling, I bind myself, my heirs, administrators, and assigns, particularly the above-mentioned schooner brig Clarence, together with all the apparel, tackle, boats, and stores of every kind belonging to the said schooner brig, as well as her present freight and cargo, consisting of tallow, lathwood, &c. thankfully to consent and pay to the said Messrs. Belfour, Ellah, Rainalls, and Co. aforesaid, or their attorneys or assigns, the above-mentioned sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, all postages and reasonable charges attending recovering the same : and putting aside all and every detention of law, arbitration, or reference, I do further hereby bind myself, said schooner brig Clarence, her freight and cargo of every kind, to the full and complete payment of said sum, with all charges thereon, in eight days after my arrival at the aforementioned port of London : and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of London, in preference to all other debts and claims ; declaring hereby that the said vessel is at present free from all encumbrances whatsoever, and that this pledge or bottomry has now and must have preference to all other claims and charges in any shape or manner, until such sum of 1077*l.* 17*s.* 9*d.* sterling, with 12 per cent. bottomry premium, making together 1207*l.* 4*s.* 8*d.* sterling, with lawful interest, and all charges are duly paid in money of Great Britain, or until the said Messrs. Belfour, Ellah, Rainalls, and Co. of Elsinour, or their assigns, have declared themselves in writing fully satisfied with security given for such payment,” as by the said writing obligatory, reference being thereunto had, fully appears :

*And whereas the said Messrs. Belfour, Ellah, Rainalls, & Co., in the said writing obligatory mentioned, did at the time of the making of the [*116] said writing obligatory, to wit, on, &c., at, &c., as the agents of and on account and behalf and at request of the said plaintiffs, lend and advance to the said

William Adams the said sum of 1077*l.* 17*s.* 9*d.* of the moneys of them the said plaintiffs, on bottomry, in manner and for the purposes and on the conditions in the said writing obligatory specified; and whereas the said writing obligatory was made and executed to the said Messrs. Belfour, Ellah, Rainalls, & Co. as such agents of the said plaintiffs, and on their behalf and for their use and benefit, whereof the said William Adams then and there had notice:

And whereas, after the making of the said writing obligatory, and after the lending and advancing of the said sum of 1077*l.* 17*s.* 9*d.*, to wit, on, &c., at, &c., the said William May Simonds on behalf of himself and the said Giles Loder, according to the usage and custom of merchants, caused to be made a certain writing or policy of assurance, containing therein that the said William May Simonds, by the name and addition of W. M. Simonds, Esq., as well in his own name as for and in the name and names of all and every person or persons to whom the same did, might or should appertain in part or in all, did make assurance and cause himself and them and every of them to be insured, lost or not lost at and from Elsinour to London, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the Clarence, &c. (in the usual form), continuing the adventure until the said ship, &c., with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever should be arrived at London, and until she had moored at anchor twenty-four hours in good safety, &c.; and that *the said ship, &c.*, goods and merchandises, **117] &c., for so much as *concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at l. on bottomry, free from average, and without benefit of salvage; as by the said writing or policy of assurance, reference being thereunto had, will more fully appear; of all which said premises the said defendant afterwards, to wit, on, &c., at, &c., had notice.*

And thereupon afterwards, to wit, on, &c., at, &c., in consideration that the plaintiffs, at the special instance and request of the defendant, had then and there paid to him a large sum of money, to wit, the sum of 1*l.* 11*s.* 6*d.*, as a premium and reward for the assurance of 200*l.* of and upon the premises in the said writing or policy of assurance mentioned, and had then and there undertaken, and to the defendant faithfully promised to perform and fulfil all things in the said writing or policy of assurance contained, on the part and behalf of the assured, to be done, performed, and fulfilled, the defendant undertook, and to the plaintiffs then and there faithfully promised that the defendant would become and be an assurer to the plaintiffs for the sum of 200*l.*, of and upon the premises in the said writing or policy of assurance mentioned, and would perform all things in the said writing or policy of insurance contained on his part and behalf, as such assurer of the said sum of 200*l.*, to be performed and fulfilled; and the defendant then and there became an assurer to the plaintiffs, and then and there duly subscribed the said writing or policy of assurance as such assurer as aforesaid, to wit, at, &c.

And the plaintiffs further say, that the ship or vessel in the said policy mentioned is the same ship or vessel in the said writing obligatory mentioned, and that the sum of 200*l.* insured by the said policy was by way of insurance of part of the said sum of 1207*l.* 4*s.* 8*d.* in the said writing obligatory mentioned; and that the said bottomry in the said policy mentioned is the same bottomry in the **118] writing obligatory mentioned; and that *heretofore, to wit, on, &c., the said ship or vessel with her said cargo in the said writing obligatory mentioned, in the prosecution of her said voyage from St. Petersburg to London, in the writing obligatory mentioned, departed and set sail from Copenhagen aforesaid, and in the course of that voyage arrived at Elsinour in the said policy mentioned; and on, &c., the said ship and cargo were in good safety, to wit, at Elsinour therein mentioned; and that the plaintiffs at the time of making the said insurance, and continually afterwards, until and at the time of the loss hereinafter mentioned, were interested in the said bottomry in the said insurance to*

a large value and amount, to wit, to the value and amount of all the moneys by them ever insured or caused to be insured thereon; and that the said policy was made on the said bottomry to and for the use and benefit and on the account of the said plaintiffs, to wit, at, &c.

And the plaintiffs further say, that afterwards, to wit, on, &c., the said ship with the said cargo on board thereof, in prosecution of her said voyage from St. Petersburg, departed and set sail from Elsineur aforesaid on her said intended voyage in the said policy mentioned; and afterwards, and whilst she was proceeding on the said voyage, and before she arrived at London aforesaid, to wit, on, &c., was by and through the force of stormy and tempestuous weather, and by the perils and dangers of the seas, wrecked, stranded, driven on shore, and wholly lost, and never did proceed on the same or any other voyage, and never did arrive at London aforesaid; and the said cargo thereby became and was spoiled, damaged, destroyed, and wholly lost; and the said freight, also in the said writing obligatory mentioned, became and was by reason of the premises wholly lost, to wit, at, &c., whereof the said defendant afterwards, to wit, on, &c., there had notice. By reason whereof the said defendant then and there *became and was liable to pay, and ought to have paid the said sum of 200*l.* so by him insured as aforesaid, according to the meaning and effect [*119 of the said writing or policy of insurance, and of his said promise and undertaking so by him made as aforesaid, to wit, at, &c.

Demurrer and joinder.

Wilde, Serjt., in support of the demurrer. The bond set out is not a bottomry bond; the declaration, therefore, is ill in two respects: first, because it misdescribes the bond; and, secondly, because it discloses no insurable interest, unless the bond be a bottomry bond. A bottomry contract exists only where money lent is hazarded on the bottom of a ship, and is payable only on her arrival at the end of her voyage.

In the present contract, the master having bound himself personally, the payment of the sum borrowed never depended on the arrival of the ship. The lender might have demanded it, according to the bond, although the ship never left Elsineur. The contract is without benefit of salvage and free from average, and the plaintiff's money never was in risk.

Stephen, Serjt., *contra*. There must, no doubt, be some risk where money is lent on bottomry; according to the definition given by Blackstone, "Bottomry is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*pars pro toto*) as a security for repayment: in which case it is understood that if the ship be lost, the lender loses his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest, agreed upon, however it may exceed the legal rate of interest;" but the risk may be more or less; and this case falls within the statutory definition in the preamble of *6 G. 1, c. 18. Bottomry bonds vary in form; and in Appendix No. 2, of Abbott on Shipping, is a form which comes near the present. Policies on bottomry, containing the condition "without benefit of salvage, and free from average," are effected in Denmark and Spain; *Busk v. Fearon*, 4 East, 325, *Walpole v. Ewer*, Park on Ins. 428, 4th edit.; and by 19 G. 2, c. 37, in *respondentia* on East India voyages. But the effect of the instrument here is, that the money shall only be paid on the arrival of the ship. "After my arrival," means after my arrival as master of the ship. Even the master's personal arrival is a matter of contingency, and places the money at hazard. That contingency is sufficient to render this a contract of bottomry; and if there were any doubt, the employment of the word bottomry in the bond ought to be conclusive.

Wilde. The form in the Appendix to Abbot on Shipping is the form of an East India bond; and the statutory regulations of East India voyages do not apply to ordinary bottomry. Risk on the ship's bottom is of the essence of the

essence of the contract. Here, if the master arrived, the money might be recovered although the ship were lost.

TINDAL, C. J. Our judgment must be for the defendant. When the underwriter entered into a contract in which the interest of the assured was described to be an interest on bottomry, he expected, no doubt, that it would be what is ordinarily termed bottomry interest; but such a description of the bond and of the plaintiff's interest is manifestly false, since the plaintiff's claim under it does not depend on the risk of the voyage, but, according to the terms employed, may be made whether the ship do or do not arrive.

*121] *PARK, J. In *Glover v. Black*, 3 Burr. 1394, it was decided, that when the interest of the assured is in *bottomry* or *respondentia*, it must be mentioned in the policy; but the interest here is of a nature totally different from bottomry or *respondentia*. Lord Kenyon was new in his office when *Walpole v. Ewer* was decided, and the decision did not give satisfaction. Mr. Justice Buller in *Newman v. Cazalet*, Park on Ins. 424, differed, but put the decision on the ground of usage in the particular case; and Lord Ellenborough in *Power v. Whitmore*, 4 M. & S. 141, decided contrary to *Walpole v. Ewer*.

BURROUGH, J., and GASELER, J., concurred in giving

Judgment for the defendant.

CURLING v. SHUTTLEWORTH. July 3.

By a deed of 1812, mortgagor assigned to mortgagee a policy of insurance; in a deed of 1813, between the same parties, upon a further advance, there was a power to sell the policy if the mortgage money were not paid on a given day; but upon a further advance in 1822, with conversion of unpaid interest into principal by a third deed, the power was omitted: The mortgagee having afterwards advertised the policy for sale *under a power*, and the mortgagor having refused to concur in the conveyance, Held, that a purchaser was entitled to recover back the deposit money paid on the sale.

THIS was an action on the case, brought by the plaintiff to recover from the defendant the sum of 322*l.*, and interest thereon, at 5 *per cent.*, from the 5th October, 1828.

The declaration contained the usual money counts, a count for interest, and on an account stated. The cause was tried at the first London sittings in Easter

*122] term last, when a verdict was, by consent, taken for the *plaintiff, damages 500*l.*, subject to the opinion of the Court on the following case:—

The defendant, who was an auctioneer, offered for sale by auction two policies of assurance, in the Society for Equitable Assurances, according to certain particulars and conditions of sale. The particulars stated that such policies would be sold by order of the executors of the mortgagee, John Chatfield, Esq., deceased, and *under a power of sale*.

The plaintiff attended the sale, and was declared the purchaser of the second lot mentioned in the particulars of sale, for the sum of 1610*l.* The lot was described as a Policy of Assurance, No. 24,143, for the sum of 2000*l.*, effected with the Equitable Society, Blackfriars, June 18th, 1808, by a gentleman now in the 61st year of his age or thereabouts, with the accumulations thereon, amounting to 1100*l.* or thereabouts, making in the whole 3100*l.* or thereabouts, annual premium 69*l.* 16*s.* The fourth condition of sale provided that the purchasers should, at their own expense, have proper assignments from the vendors, on payment of the residue of the purchase-money. The plaintiff paid the sum of 322*l.* as a deposit.

The plaintiff also signed the following agreement, endorsed on a particular of sale.

"I hereby agree to purchase Lot 2, described in this particular agreeably to the annexed conditions, and to give for the same the sum of one thousand six hundred and ten pounds."

On the 21st of October, 1828, an abstract of the title of the vendors to the policy was delivered by their solicitors to the solicitors of the plaintiff, which set out the following documents; (viz.)

A policy of insurance in the usual form, dated the 18th June, 1808, numbered 24,148, and under the hands *and seals of two of the trustees of the Society for Equitable Assurances on lives and survivorships, on the [*123 life of Charles Bankhead, of Lower Grosvenor Street, in the county of Middlesex, Doctor of Medicine :—

An indenture of the 1st of February, 1812, and made between the said Charles Bankhead of the one part, and John Chatfield, Esq., of the other part; whereby, in consideration of 845*l.*, therein mentioned to be due and owing from the said Charles Bankhead to the said John Chatfield, he, the said Charles Bankhead, assigned unto the said John Chatfield, his executors, administrators, and assigns, together with another policy, the said policy of assurance, and all money then due or to become due by virtue thereof, subject to a proviso for redemption, on payment of the sum of 845*l.* and interest at 5 per cent., on the 1st day of March then next :—

A deed poll, endorsed on the last-mentioned indenture dated the 8d of April, 1813, and under the hand and seal of the said Charles Bankhead; reciting a loan from the said John Chatfield to the said Charles Bankhead of 560*l.*, in addition to the said sum of 845*l.*, the whole of which sum of 845*l.* and interest, as well as the said sum of 560*l.*, still remained due to the said John Chatfield, and that the said Charles Bankhead had agreed to make such further assurances for securing the same as thereafter mentioned, in consideration of the said sum of 560*l.*; and for securing the repayment thereof, and such further sums as thereafter mentioned, with interest, the said Charles Bankhead covenanted with the said John Chatfield, that the said policy of assurance, and all other the premises by the last-mentioned indenture assigned, should stand charged with and be a security unto the said John Chatfield, his executors, administrators, and assigns, as well for the payment of said sum of 845*l.* and interest, and the said sum of 560*l.* *and interest, as also for all such further and other sum [*124 and sums of money as might be advanced and lent or paid unto or for the said Charles Bankhead, by the said John Chatfield, his executors, administrators, or assigns; or which might be paid by the said John Chatfield, his executors, administrators, or assigns, to the said assurance office, or otherwise, to keep on foot the said policy and the full benefit thereof, together with interest, and all such costs, charges, and expenses as therein mentioned, not exceeding in the whole, exclusive of the said sum of 845*l.*, the sum of 3000*l.*; and that the said policies and premises should not be redeemed or redeemable, either in law or in equity, until not only the said sum of 845*l.* and interest, and 560*l.* and interest, but also all such further sum and sums of money which might at any time be lent, advanced, or paid by the said John Chatfield to or for the said Charles Bankhead, should be fully paid and satisfied: and for the considerations in the said deed poll before mentioned, and for better securing to the said John Chatfield, his executors, administrators, and assigns, the due payment of the said several sums of 845*l.* and 560*l.*, and such further sums of money as might be paid, advanced, or lent by the said John Chatfield, his executors, administrators, or assigns, by virtue of the said deed poll, with interest for the same as therein aforesaid, the said Charles Bankhead did thereby expressly and fully authorize and empower the said John Chatfield, his executors, administrators, or assigns, in case the said several sums of 845*l.* and 560*l.*, and such (if any) further sum or sums of money as might be advanced or paid as therein aforesaid, with interest as therein aforesaid, should not be fully paid off and satisfied to the said John Chatfield, his executors, administrators, or assigns, on or before the 1st day of June then next, at any time or times after the said 1st *day of June then next, to sell and absolutely dispose of the said policy assurance, [*125 and all benefit and advantage thereof, either by public auction or private contract, unto any person or persons whomsoever, for any reasonable price which

could at the time of such sale be obtained for the same; and to seal, execute, and deliver all such deeds, conveyances, and assurances as might be requisite and proper for the completion of such sale or sales, and vesting the same premises in the purchaser or purchasers thereof, and to stand possessed of and interested in all and every the sum and sums of money which should arise and be produced from such sale or sales, upon trust, after paying thereout the costs of the sale, to retain the said sums of 845*l.* and 560*l.*, and such sum or sums of money as might thereafter be paid, advanced, or lent by the said John Chatfield, his executors, administrators, or assigns, in pursuance of the said deed poll, or the indenture of the 1st February, 1812, and interest, and to pay the residue unto the said Charles Bankhead, his executors, administrators, or assigns: and it was by the said deed poll declared, that all contracts, agreements, sales, conveyances, and assurances, acts, deeds, matters, and things which should be entered into, made, done, or executed by the said John Chatfield, his executors, administrators, or assigns, of or concerning the said policy and premises, should to all intents and purposes be valid and effectual, although the said Charles Bankhead, his executors or administrators, should not execute, join, concur in, or assent to the same; and that the purchaser or purchasers should be entitled to have, hold, and enjoy the same against the said Charles Bankhead, his executors, administrators, and assigns, and all persons claiming or to claim under or in trust for him or them, in like manner as if the said Charles Bankhead, his executors, administrators, or *126] assigns, had been a party to and executed the conveyance or assurance thereof, free from all equity and benefit of redemption, claim, and demand whatsoever; and that the receipts of the said John Chatfield, his executors, administrators, or assigns, should be sufficient discharges to the purchasers of the said premises; and that such purchasers should not afterwards be answerable for any loss, misapplication, or non-application of their purchase-money:—

An indenture dated 3d June, 1822, and made between the said Charles Bankhead of the one part, and the said John Chatfield of the other part, by which, after reciting, amongst other things, the indenture of the 1st of February, 1812, and the deed poll of the 3d of April, 1813; and reciting certain indentures of settlement by virtue whereof the said Charles Bankhead was entitled to a contingent estate for life, and a contingent reversionary interest in certain leasehold property, held under renewable leases granted by the Lord Primate of Ireland; and also reciting that the said sum of 845*l.*, secured by the said indenture of the 1st of February, 1812, and then still due to the said John Chatfield, together with all interest for the same to the 1st of January then last; and that the said sum of 560*l.*, secured by the said deed poll of the 3d April, 1813, was still due to the said John Chatfield, together with lawful interest thereon up to the 1st of January then last; and also reciting that the said John Chatfield, on the 1st of January, 1814, lent to the said Charles Bankhead, on the security of the said deed poll, a further sum of money, making, with the interest due at that time on the said two several sums of 845*l.* and 560*l.*, the sum of 1295*l.*, and for which said sum of 1295*l.* the said Charles Bankhead gave his note of hand to the said John Chatfield, payable on demand, with legal interest for the same; *127] and also reciting that all interest in respect of the said sum of *1295*l.*

was due to the said John Chatfield up to the said 1st of January then last; and that the said sums, secured by the said recited indenture and deed poll, and the interest for the same respectively up to the 1st of January then last, made together the sum of 3780*l.*, which it had been agreed should be all considered as principal, and should carry interest on the whole amount thereof from the 1st of January then last; and also reciting that the said John Chatfield had then lately paid or advanced to or on account of the said Charles Bankhead, or had become security for him for several sums of money, making in the whole 923*l.* 12*s.* 10*d.*; and that in order further to secure the repayment to the said John Chatfield of the said sum of 3780*l.* and 923*l.* 12*s.* 10*d.*, making together 4703*l.* 12*s.* 10*d.*, and interest for the same, and of such further or other sums of money as thereafter mentioned, in manner thereafter expressed, the said

Charles Bankhead had agreed to subject and charge the said policy in manner thereafter mentioned, and also to execute such assignment of the reversionary estates and interest of him the said Charles Bankhead in the premises comprised in the said thereinbefore in part recited indenture of settlement as is thereafter contained;—it is witnessed, that in pursuance of the said agreement, and in consideration of the premises, and for the nominal consideration therein mentioned, the said Charles Bankhead did subject and charge the said policy of assurance with the payment to the said John Chatfield, his executors, administrators, or assigns, of the said sum of 4703*l.* 12*s.* 10*d.*, including the said sums of 845*l.* and interest, and 3000*l.* and interest, so secured by the said indenture of the 1st February, 1812, and deed poll, and such further sums of money as should or might thereafter be advanced or paid by the said John Chatfield, his *executors, administrators, or assigns, to or on account of the said Charles Bankhead, or which should or might at any time thereafter become due [*128 or owing from the said Charles Bankhead to the said John Chatfield on any account whatsoever, with interest; subject nevertheless to a proviso for making void the said indenture, and every article, clause, matter, and thing therein contained, on payment by the said Charles Bankhead, his heirs, executors, or administrators, unto the said John Chatfield, his executors, administrators, or assigns, of the sum of 3780*l.* on the 1st January then next, with interest at 5 per cent. from the 1st day of January then last, and also on payment of 923*l.* 12*s.* 10*d.*, and of all such further sums as the said John Chatfield should pay for keeping on foot the said policy, or otherwise for the use or benefit or on account of the said Charles Bankhead, with interest: and the indenture also witnessed that, in further pursuance of the said agreement, the said Charles Bankhead did grant and assign to the said John Chatfield, his executors, administrators, and assigns, all those the reversionary estates or interests to which by virtue of the indenture of settlement therein recited he the said Charles Bankhead might eventually be entitled in the premises therein comprised, to hold the same unto the said John Chatfield, his executors, administrators, and assigns absolutely, subject nevertheless to the proviso or condition for redemption thereinbefore contained.

The said John Chatfield died subsequently to the date of the deed lastly above recited, having previously made his will, appointing the vendors of the policy in question, executors; and probate thereof was duly granted to such vendors.

The said Charles Bankhead, since the execution of the indenture of the 3d June, 1822, executed mortgages of *or other encumbrances upon the [*129 policy in question to other persons.

The plaintiff required that the title of such subsequent encumbrancers should be shown, and that they and Dr. Bankhead should join in the assignment to the plaintiff. The solicitors for the vendors declined to produce such title, or to procure the concurrence of the encumbrancers and Dr. Bankhead in the assignment.

This action was thereupon brought by the plaintiff against the defendant to recover the amount of the deposit on the sale, being 322*l.*, and interest at 5 per cent. from the 15th October, 1828, the day on which it was paid.

The question for the opinion of the Court was, Whether, under the circumstances stated in the case, a good title had been made to the policy sold to the plaintiff? If the Court should be of opinion that a good title had not been made, the verdict for the plaintiff was to stand; but its amount was to be reduced to such sum as the Court should think proper. And if the Court should be of opinion that a good title had been made, a nonsuit was to be entered.

Wilde, Serjt., for the plaintiff. The policy has not been sold under the power, and therefore the condition of sale has not been observed. When the mortgagor and mortgagee executed the third deed, and entered into a new contract and debt, without mention of the power in the second deed, the power was thereby extinguished. The third deed annulled the previous contract, and the time for sale under the power was past. Where a mortgagee sells without a power, he sells only the mortgage debt, with his interest in the policy, but not the policy

itself. Such a sale leaves the mortgagor a right to redeem as against the purchaser; and if the life in the policy drops, the purchaser becomes a trustee *130] for the mortgagor or his representatives for all beyond the sum due. As the purchaser had no means of knowing whether anything had been paid under the second deed, he might be holding the policy, not absolutely, but merely as a security for what remained due upon the whole of the transactions between the mortgagor and mortgagee; so that the power being extinct, no absolute title to the policy could be conveyed without the concurrence of the mortgagor. Courts of equity lean against powers of sale. A power of sale for personalty is as a power of foreclosure for realty, and a purchaser cannot be safe without it.

Russell, Serjt., contra. First, the power of sale is not extinguished or affected by the third deed. Secondly, the vendors can sell and make a good title without that power.

The deed of 1822 refers to and recognises the deeds of 1812 and 1813 as existing securities; and it never could have been the intention of the parties, that the mortgagee should lose a portion of his security upon making an additional advance. The power was merely suspended for a short time in 1822, between the date of the deed of that year, and the day of forfeiture named in it.

No case or principle has been referred to under which a power can be said to be extinguished or destroyed upon a party's giving a further security.

The giving another security does not operate as an extinguishment of a former security, even by being pursued to judgment, unless it produce the fruits of a judgment. Thus it was held, that an action lay on a covenant for non-payment of money, notwithstanding a note had been given by the defendant to the plaintiff after the day of payment, "in payment and satisfaction of the debt," and *131] judgment had been recovered on such note, it not appearing that it was accepted, as well as given in satisfaction, or that it had actually produced satisfaction: *Drake v. Mitchell*, 3 East, 251. So, a bond given in lieu of a covenant will not discharge the covenant. As in *Kaye v. Waghorn*, 1 Taunt. 428: which was an action brought by the plaintiff against the defendant (who had sold to plaintiff some freehold premises) on a covenant that defendant and his wife should levy a fine. Plea, that after executing the conveyance, and before request to levy a fine, it was agreed between the parties, that defendant should give his bond conditioned for indemnifying the plaintiff against any claim of dower of defendant's wife, and that plaintiff should accept the same in lieu and satisfaction of the said covenant, and in respect of the supposed breach thereof: averment, that he did execute the bond accordingly, and that the plaintiff accepted the same in lieu and satisfaction, and in discharge of the covenant. Demurrer; amongst other causes, that the bond was an instrument of the same nature as that on which the action was brought, and did not give the plaintiff a better or more summary remedy for any damage he might sustain by reason of the breach of covenant; and that the bond was not a defeasance of the covenant, nor an indemnity against all damages which the plaintiff might sustain by reason of the breach of covenant; and plaintiff had judgment.

Here, the remedy by sale would be taken away, and no better remedy would be given, if the covenant in the deed of 1813 be held to be extinguished.

It is a mistake to suppose that the conversion of interest into principal made a new debt: the conversion of interest into principal is in the nature only of a further advance. (a)

*132] The power of sale was only suspended by the deed of 1822. In *Cork v. Saunders*, 1 B. & A. 46, where an insolvent by agreement (dated March, 1816) assigned his property, the creditors consenting that the business should be carried on for their benefit till the next Michaelmas, and then that the property should be sold and divided amongst them, shortly after that Michael-

mas, the creditors agreed that the business should be carried on for another year, viz. till Michaelmas 1817, upon the same terms and conditions as in the original agreement; it was not suggested that this arrangement, by which the sale and division of the property were suspended, had the effect of defeating the power of sale and division, but it was held even to bind a creditor who had signed the first agreement, but had not in any way concurred in the second.

If this were a sale under the power, the concurrence of the mortgagor cannot be required: *Clay v. Sharpe*, Coote on Mortgages, 132. The condition is express that the assignment shall be from the vendors only; viz. the executors of the mortgagee.

Secondly, the vendors can sell and make a good title without the power.

Even in equity, where the property mortgaged is reversionary, the Court does not decree a foreclosure, but a sale and satisfaction of the mortgagee's demand out of the produce: *How v. Vigurs*, 1 Ch. Rep. 33. So on the mortgage of an advowson, the mortgagee of the advowson may pray a sale: *Mackenzie v. Robinson*, 3 Atk. 559. So if a mortgagor die, and his personal estate prove deficient to discharge the mortgage, the mortgagee may, on filing a bill to enforce payment of the money due, pray a sale *of the mortgaged estate in the first instance: *Daniel v. Skipwith*, 2 Br. Ch. Ca. 155. *Powell on Mortgages*, 1094. And where there is a mortgage of personalty, a day being fixed for the repayment of money lent thereupon, the pledgee or mortgagee has in law or in equity, as the case may be, a right to sell, and to satisfy himself out of the proceeds. Thus, upon a mortgage of stock, when the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself, principal and interest, without any authority from the mortgagor, and without filing any bill for foreclosure: *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood and Others v. Ewer*, 2 Atk. 303. And from *Lockwood v. Ewer* it seems, that a bill for a foreclosure in such a case would be dismissed. *Kemp v. Westbrook*, 1 Ves. 278, is to the same effect; viz. that a pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of such stock, but may sell it.

And in general, though where a party has a simple lien on goods he cannot sell and dispose of them, yet, if he has a special property in those goods in trust for another, subject to a claim of his own, in such case he may sell in order to repay himself. Per *Holroyd, J.*, in *Cazenove v. Prevost*, 5 B. & A. 78.

The circumstance that the conditions of sale state a power of sale, cannot be a material if a good title can be made by other means.

The claim for interest is out of question, it never having been allowed on the recovery of deposit money: *Calton v. Bragg*, 15 East, 223.

TINDAL, C. J. The verdict ought to stand for the principal sum sought to be recovered. As to interest, the *case is not one in which it has ever been allowed. With regard to the principal, the rule is, that where upon a sale there is such doubt upon the vendor's title as to render it probable the purchaser's right may become a matter of investigation, the Court will not compel him to complete the purchase. Here, according to the conditions of sale, the policy was to be sold under a power; the vendors, therefore, should have shown an unquestionable power, for there are no means of calculating the compensation to be allowed in case of any mistake. Supposing the power to have been only suspended, there may be a candid doubt how far that suspension may be considered to operate in a court of equity, and if there be a reasonable degree of doubt, this Court will not expect the purchaser to proceed.

PARK, J. I am of the same opinion. We ought not to drive parties into courts of equity. As to the claim for interest, ever since the case of *Calton v. Bragg*, it has been holden that interest cannot be recovered upon a mere deposit. In *Farquhar v. Farley*, 7 Taunt. 592, 1 B. Moore, 323, it was holden, indeed, that the purchaser might allege and recover against the vendors special damage for the loss of interest on a deposit repaid for insufficiency of title in the vendor;

but in *Lee v. Munn*, 1 B. Moore, 481, 8 Taunt. 45, it was decided, that at all events an auctioneer is not liable to pay interest on a deposit.

BURROUGH, J. Unless it be proved that the auctioneer has made interest of the money, no interest can be demanded. As to the principal question, if there be reasonable doubt as to a title, we cannot compel a party to take it. Here, *135] there is not only doubt, but, *in my opinion, the power is gone by, not being mentioned in the third deed.

GASELEE, J., concurred in giving

Judgment for the plaintiff.

HETHRINGTON v. GRAHAM. July 6.

Adultery is a bar to dower, although committed after the husband and wife have separated by mutual consent.

THE demandant, in this case, counted upon a writ of dower *unde nihil habet*, to which the tenant pleaded in bar, that the demandant, in the lifetime of her late husband, and during her coverture with him, voluntarily, and of her own accord, left her husband, and from thence until the time of his death voluntarily and of her own accord lived away from him, and during her coverture with her said husband, continually, until the death of one William Coulson, of her own accord, and without the license or consent, and against the will of her husband, lived away from her said husband in adultery with the said William Coulson. And the plea further alleged, that the husband was not at any time after the demandant left his house, or after she lived in adultery with the said William Coulson, voluntarily or in any manner reconciled to her. To this plea the demandant replied, that although true it was that she voluntarily and of her own accord left her husband, yet that she left him with his consent for that purpose granted, and separated and parted from her husband, and that such separation continued with their mutual consent until the husband's death, and that if any act of adultery took place, the same took place after such her separation and parting from her husband, and during the period of such separation by their *136] mutual consent. The tenant *in his rejoinder merely re-asserted the fact, that the demandant of her own accord, and without the license or consent of her husband, lived in adultery with the said W. Coulson. To which rejoinder there was a general demurrer.

Willie, Serjt., for the plaintiff. The plea is ill: the adultery, under the circumstances stated in it, being no bar of dower. Adultery being an offence cognisable by the ecclesiastical court only, is no bar of dower at common law: 2 Inst. 435. But by 13 Ed. 1, c. 34, it is enacted, that if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon. It is not easy to discover the principle of this enactment; for it has been held, that if the husband receive his wife again, or if he grant her with all her goods, she does not lose her dower: 2 Inst. 435. The statute, therefore, creating a forfeiture, must be construed strictly; *Kent v. Whitby*, 4 Bro. P. C. 362; and can only be enforced where all the terms of the enactment are complied with. Adultery of itself will not occasion a forfeiture. The wife must go away with her adulterer willingly; must continue with him, and be thereupon convict.

The present plea does not state that she eloped with her adulterer, or that she was convicted thereupon. All the precedents aver at least the elopement with the adulterer: *Haworth v. Herbert*, 2 Dyer, 106 b; *Rastal*, 230, Lib. Intrat. fo. 20, 9 Vin. Abr. *Dower*. No plea can be found resembling the present.

Jones, Serjt., *contrd.* The principle of the statute is the protection of public *137] morals, and the punishment of *the offence of the wife; and the concurrence of all the modes of committing the offence specified in the act is

not essential to a forfeiture. Lord Coke says, 2 Inst. 434: "Albeit the words of this breach be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, and after consent, she shall lose her dower: for the cause of the bar of her dower is not the manner of her going away, but the remaining with the adulterer in adultery without reconciliation, that is the bar of the dower:" and in Paynell's case, *Ibid*, where the plea stated that the wife left her husband, and lived as an adulteress with Sir W. Paynell, the bar was held sufficient, although there was no allegation that she eloped with Sir W. Paynell. So, if she elope with the adulterer, she loses her dower although she do not remain with him, or remain by constraint: *Ibid*. And in Chambers v. Caulfield, 6 East, 244, it was held, that a husband might maintain an action for criminal conversation with his wife, although he was living separately from her under a deed of separation. In Coot v. Berty, 12 Mod. 232, and in Govier v. Hancock, 6 T. R. 603, it was held that a husband was not bound to receive his wife after she had committed adultery, although he had been the aggressor, and had turned her out of doors. "If she be thereupon convicted," means only if the fact be proved. None of the entries allege conviction in form.

Wilde in reply. If the single act of adultery is to occasion forfeiture, the cases in which it has been holden that the wife retains her dower notwithstanding adultery, must be overruled; and the principle of public morals is hardly consistent with the case of the husband's granting the wife with her goods, or his receiving her again after an act of adultery; in neither of which *cases does she forfeit her dower: it may, therefore, be contended, that elope- [*138 ment with the adulterer is essential to the forfeiture according to the statute.

Cur. adv. vult.

TINDAL, C. J. The question raised upon the pleadings for the judgment of the Court is this: Whether, under the statute 13 Ed. 1, c. 34, commonly called the statute of Westminster the 2d, the committing an act of adultery, and continuing with the adulterer, is any bar to the wife's right to dower, where she has previously left her husband with his consent, and is living apart from him with such consent at the time of the adultery; or, whether it is necessary, in order to satisfy the words of the statute, that the original leaving of her husband should be a leaving with the adulterer by his means or persuasion.

That the adultery of the wife was no bar of the wife's dower at common law, is expressly laid down by Lord Coke in his reading on this statute in 2 Inst. p. 435. Indeed, it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the courts of common law took no cognisance. As well, however, for the purpose of preventing that offence, as more probably with the view of protecting the heir against the danger of introducing a supposititious offspring into the family, it is enacted by the thirty-fourth chapter of the statute, "that if a wife willingly leave her husband, and go away and continue with her advowter, she shall be barred for ever of an action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon," except in an event which has not happened in this case, and to which it is therefore unnecessary to advert. It is somewhat singular that throughout the whole of this long statute, consisting of fifty chapters, this is the only one in the old law French, *the whole of the others being in Latin; and even this chapter changes from the law French to Latin, just [*139 at the place where this subject begins.

The chapter, however, after making a distinction between the carrying away women without force and with force, and enacting a punishment for those offences, provides for the case now in question, viz., that of the woman leaving her husband willingly, and continuing with her adulterer, in the words above cited.

Now it is contended on the part of the demandant, that each part of the description of the offence contained in the act must be taken to be cumulative; so that the dower is not barred unless the wife has left her husband willingly with the adulterer; has gone away with him, and has also continued with him. Whilst, on the part of the tenant, it is insisted, that it is sufficient to bring the case within the

statute if the wife has of her own consent left the society of her husband, and, after she has so left him, commit the act of adultery; and the Court is of the latter opinion.

It may be admitted, as the fact is, that in all the ancient precedents the leaving of the husband by the wife is stated to have been "with the adulterer." See Lib. Intrationum, fo. 20, Rastal, 230, Dyer, 107. But we think this is not conclusive on the point; for, as there can be no doubt that the case is within the statute where all these circumstances concur, so the pleader would of course insert them where the facts of the particular case warranted the insertion. And, on the contrary, there is direct authority that *all* the circumstances mentioned in the statute need not concur in form, provided they do so in substance; for Lord Coke lays it down in 2 Inst. 434, that, "Albeit the words of this branch be in the conjunctive, yet if the woman be taken away, not *sente*, but against her will, and *after* consent, and remain with the adulterer without being reconciled *140] &c., she shall lose her dower; for the cause of the bar of her dower is not the *manner of the going away*, but the remaining with the adulterer in avoutry without reconciliation, that is the bar of the dower." And this appears more evident by the case of Sir John Camoys, cited in 2 Inst. 434, where the plea states that the wife left her husband in his life, and lived as an adulteress with Sir W. Paynel, and the replication took issue that she did not live as an adulteress with the said Sir W. P., wherein the bar was held good, though there was no allegation that she left with the adulterer: and it ought not to be forgotten that Britton, whose book was published immediately after the framing of this statute, speaking of a writ of dower brought against the heir and his guardian, says, "He may say she hath forfeited dower of her husband by her adultery; for she went from her husband to another bed after she had married him and so forfeited her dower." Now here no mention is made of a leaving of the husband, either willingly or with any particular person, but the plea states only in substance that the wife was living apart from her husband in adultery. The authorities, therefore, above referred to, place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the circumstances attending the elopement; and as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be what the words still will warrant, that if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited. We therefore hold the plea in bar in this case to be sufficient, and give judgment for the tenant.

Judgment for the tenant.

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*KEMBLE v. FARREN. July 6.

Liquidated damages cannot be reserved on an agreement containing various stipulations, of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.

ASSUMPSIT by the manager of Covent Garden Theatre against an actor, to recover liquidated damages for the violation of an engagement to perform at Covent Garden for four seasons.

By an agreement between the plaintiff and defendant, the defendant had engaged himself to act as a principal comedian at Covent Garden Theatre for four seasons, commencing with October, 1828, and in all things to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the ensuing four seasons; and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein

contained, such party should pay to the other the sum of 1000*l.* to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged was, that the defendant refused to act during the second season; and at the trial the jury gave a verdict for the plaintiff for 750*l.* damages, subject to a motion for increasing them to 1000*l.*, if the Court should be of opinion that, upon this agreement, *the plaintiff was entitled to the [*142 whole sum claimed as liquidated damages.

Wilde, Serjt., having accordingly obtained a rule nisi to that effect,

Spankie, Serjt., showed cause. Upon this agreement the plaintiff is not entitled to recover 1000*l.* for liquidated damages, but only such compensation as a jury shall think fit. The rule is, that where an agreement contains several stipulations, some of them touching matters of great importance to the parties, and others, matters of little or no importance, a covenant for liquidated damages, generally, upon any violation of the agreement, shall not be carried into effect, however strong the language may be. But if the agreement consist only of a single stipulation, or the covenant for liquidated damages be confined to any specified breach or breaches where the agreement contains more than one stipulation, such covenant is valid, and may be enforced. And this is no violation of the rule, that written instruments shall be construed according to the intention of the parties; for the parties must be taken to have overlooked the effect of their words, when by a general covenant for liquidated damages, they propose such an absurdity as the payment of a sum disproportionately heavy for an omission to observe the most unimportant part of an agreement.

For instance, it might probably have been intended between the parties in this case, that the defendant should forfeit 1000*l.* if he quitted Convent Garden Theatre, and joined a rival establishment; but it never could have been in the contemplation of the parties, that he should forfeit 1000*l.* if he neglected to attend a single rehearsal, or that the plaintiff should forfeit 1000*l.* if he omitted to pay the defendant the salary for one night, *3*l.* 6*s.* 8*d.* But as the [*143 stipulation for liquidated damages is general, and applies in terms equally to the minutest as well as the most important violations of the agreement, the Court has no means of determining to which breach the parties meant it should be actually applied, and must, therefore, leave it to a jury, to ascertain the probable amount of damage. The leading case on the subject is *Astley v. Weldon*, 2 B. & P. 346, where the manager of a theatre sued an actress on the breach of an agreement to perform. That agreement also contained a general stipulation for liquidated damages in terms as strong as the present, and *Heath, J.*, said, "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." *Chambre, J.*, said, "There is one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty. The concluding clause applies equally to all the covenants." And per *Eldon, C. J.*, "There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we, then, to hold that, if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2*s.* 6*d.* or 5*s.*; but if she offend in a case which has not been so provided for, she shall pay 200*l.*?"

*That case has been recognised in *Street v. Rigby*, 6 Ves. 815. In *Lowe v. Peers*, 4 Burr. 2225, the contract had but a single object, that [*144

the defendant should marry the plaintiff, who, therefore, recovered the liquidated damages provided by the contract. And in *Reiley v. Jones*, 1 Bingh. 302, the whole object of the agreement was, that the defendant should transfer to the plaintiff his interest in a public-house. Park, J., put the judgment of the Court upon this footing. In *Barton v. Glover*, Holt, N. P. C. 43, *Farrant v. Olmius*, 3 B. & A. 692, and *Crisdee v. Bolton*, 3 C. & P. 240, the agreements for liquidated damages were all confined to some specific breach. The Court has no power to select one out of the various stipulations contained in this agreement, and apply the liquidated damages to that. The whole agreement must be taken together. In *Davies v. Penton*, 6 B. & C. 216, Bayley, J., said, "We must look at all parts of the instrument, in order to ascertain whether it was the intention of the parties that the sum of 500*l.* should be a penalty or liquidated damages. Now, where the sum which is to be the security for the performance of an agreement to do several acts will, in cases of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." Holroyd, J. "We must look to the nature of the agreement, and of the sum to be paid, in order to ascertain whether the sum which was to secure the performance of the agreement was intended to be a penalty or liquidated damages." Littledale, J. "Since the statute 8 & 9 W. 3, parties in framing agreements have frequently *145] changed the word *penalty* for *liquidated damages*; but the mere *alteration of the term cannot alter the nature of the thing; and if the Court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute." And in *Randal v. Everest*, 1 M. & M. 41, where an agreement not under seal, for the lease of a public house, contained a clause that the party neglecting to comply with his part of the agreement should pay the sum of 100*l.*, mutually agreed upon to be the damages ascertained and fixed on breach thereof, it was held, that the party making a default was not liable beyond the damages actually sustained. Lord Tenterden laid it down, that "whether the term *penalty* or *liquidated* damages be used in the agreement, a party who claims compensation for default shall only be allowed to recover what damage he has really sustained." The exaction of liquidated damages would be the more severe in the present instance, as the plaintiff has had the benefit of the defendant's services for a considerable proportion of the time agreed on; and it is contrary to every principle of contracts, that a party should have performance *pro tanto*, and a penalty too. Pothier (*Traites des Obligations*, part 2, cap. 5, art. 3, pl. 351), says, "I cannot receive the whole of the penalty, and enjoy in part the benefit of my right of servitude: I cannot, at the same time, have the one and the other."

Wilde, Serjt., contrd. In all cases the rule is, to collect the intention of the parties from the language of the agreement, and not to decide what is reasonable or unreasonable, for on that no two persons would be found to agree. On the contrary, if a contract be never so unreasonable, the Court will sustain it, provided it appears clearly to have been the intention of the parties *to carry *146] it into effect. In *Astley v. Weldon*, the Court treated the question of liquidated damages purely as a question of intention; and Lord Eldon said, "If a party choose to stipulate for 5*l.* or 50*l.*, additional rent, upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word *excessive* to the terms in which parties choose to contract with each other." Although the sum fixed in the present instance may appear somewhat exorbitant, when applied to slight violations of the contract, the parties probably fixed it on the whole agreement, on account of the difficulty of ascertaining the damages in matters regarding theatrical performance. It would be difficult, if not impossible, to prove the precise sum the plaintiff would lose by the defendant's neglecting to attend

rehearsals, and so, performing imperfectly the parts allotted to him, or by his transferring his services to a rival establishment. In *Reiley v. Jones*, the Court decided on the ground that the parties had one paramount object in the agreement, and that the defendant had violated the agreement in respect of that object. The paramount object between these parties was, that the plaintiff should retain the defendant in his theatre, and that the defendant should not transfer his services to a rival establishment; the defendant has violated the agreement in that respect. The language in which the liquidated damages are agreed to be paid is the strongest that can be employed; it manifests the clearest intention that the parties shall abide by it; and if it be not sufficient to secure the payment, there is no language and no contract by which they can be secured. *Davies v. Penton* turned on the circumstance, that the defendant had waived his right to insist on liquidated damages. *Cur. adv. vult.*

*TINDAL, C. J. This is a rule which calls upon the defendant to show cause why the verdict, which has been entered for the plaintiff for [*147 750*l.*, should not be increased to 1000*l.*

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing October 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which breach, the jury, upon the trial, assessed the damages at 750*l.*; which damages the plaintiff contends ought by the terms of the agreement to have been assessed at 1000*l.*

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1000*l.* should be taken as liquidated damages, but *negatively also [*148 that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1000*l.* For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained: and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1000*l.* But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the

breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express *149] and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Weldon*, in which it was stipulated that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of 200*l.*, to be recovered in his Majesty's Courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages: there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.

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•IN THE EXCHEQUER CHAMBER.

CAPEL and Another *v.* BUSZARD and Others, Assignees of JONES and Another, Bankrupts. *June 26.*

It was stated in a special verdict, that, by an indenture, A. demised to B. all that wharf next the river Thames described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river Thames opposite to and in front of the wharf, between high and low water mark, as well when covered with water, as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised: Held, that the lessor could not distrain, for rent in arrear, barges, the property of B., lying in the space between high and low water mark, and attached to the wharf by ropes.

TROVER for two barges; first count on the possession of the assignees. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term, 1827, the jury found a verdict of not guilty on the first count; and on the second a special verdict, stating, as to the grievances in that count mentioned, that, at the time of making the distress thereafter mentioned, W. R. Jones and G. Jones had become bankrupts, and the plaintiffs had been chosen and appointed their assignees; that the plaintiffs, as such assignees, before and at the time of the distress thereafter mentioned, were lawfully possessed, as of their property as such assignees, of the barges thereafter mentioned to have been taken and distrained by the defendants; and that by an indenture dated the 9th of March, 1816, and made before W. R. Jones and G. Jones, or either of them, became bankrupts, between one T. Brown of the one part, and the bankrupts of the other part, Brown demised, leased, &c., to the bankrupts all that wharf, ground, and premises next the river Thames, and also all that *151] capital brick-built warehouse of three floors erected and built thereon, abutting north on the river Thames, east on premises in the occupation of T. Flockton, south on the street, cartway, and common highway leading from Pickle Herring Stairs to Horsleydown Stairs, and west on Fivefoot Way or Little Wharf, for landing goods; and certain other premises in the indenture more particularly mentioned; together with free liberty for them, the bankrupts,

their executors, &c., during that demise, to land and load goods, &c., in common with the rest of the tenants of Brown at the said Fivefoot Way or Little Wharf fronting the river Thames; together with all cellars, ways, paths, passages, lights, easements, profits, commodities, and appurtenances whatsoever to the said wharf, ground, warehouse, and premises, or any of them, belonging or appertaining; *habendum*, the same premises, with their and every of their appurtenances unto the bankrupts, their executors, &c., from the 22d of March then past, for the term of thirteen years, at the yearly rent of 555*l.*, by equal quarterly payments, payable to Brown, and after his death to the person who should be entitled to the freehold of the premises. The special verdict then stated, that by the indenture, the exclusive use of the land of the river Thames, opposite to and in front of the said wharf-ground between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf, ground, and premises, but that the land itself, between high and low water mark, was not demised; that on the 12th of November, 1826, the sum of 555*l.* of the rent was in arrear and unpaid; and that on that day, and at the time of making the distress thereafter mentioned, the two barges, the property of the plaintiffs as such assignees, were attached by ropes, head and stern, to the wharf-ground aforesaid, and were lying and being *on the part of the river Thames opposite to and in front of the said wharf, ground, and premises, and between high and low water mark, the [*152 exclusive use of which was demised as aforesaid; that the defendants, on the said 12th November, as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears.

Judgment having been given in favour of the plaintiffs below, the case was brought into the Exchequer Chamber on error.

Starr, for the defendants below. The exclusive use found by the special verdict is a certain and determinate interest or profit, in contradistinction to a profit to be taken in an uncertain place, or to a mere easement, which latter could not be described in the old precedents as appendant or appurtenant; *Godley v. Frith*, Yelv. 159; but in this case, the right of the lessee between high and low water mark is found by the special verdict to be appurtenant. It may be a substantial and tangible interest whereto a lessor may resort to distrain, and yet be appurtenant to land. The technical rule is only that land shall not be appurtenant to land. In Co. Lit. 121, b, it is said, that prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant, as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Mr. Butler, in his note to this passage, after adverting to some examples to show that this position is not universally true, says, "The true test *seems to be the propriety [*153 of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity." In this case the principal is the wharf; the exclusive right to use the land between high and low water mark is the adjunct. They agree in nature and quality, so as to be capable of union without any incongruity; one, therefore, may be appurtenant to the other.

But assuming this to be an incorporeal interest, the same remedies are applicable to the recovery of it, and the same consequences at law attach on the demise of it, as upon that of the corporeal principal. It is an interest for the recovery of which an assize of *novel disseisin* would lie at common law; that is, a writ of entry, wherein A. complains that B. hath disseised him of his freehold, and the sheriff is to cause that *tenement* to be resealed, and twelve men to view that tenement, &c.: Fitz. N. B. 177. Bracton, in his chapter on the assize of *Novel Disseisin*, lib. 4, fol. 164, says, "*Locum autem non solum habet hujusmodi assisa in rebus corporalibus sicut in tenementis quituscunque; verum etiam*

in rebus incorporalibus sicut in servitutibus et in rebus quas pertinent ad tenementum sicut in jure pascendi, falcandi, fodiendi et hujusmodi." And again in fol. 176, "In quibus casibus omnibus subvenitur disseisite per breve de ingressu secundam formas inferius notandas, tam super possessionibus rerum corporalium, quam super juribus, scilicet rebus incorporalibus sicut super jure pascendi et hujusmodi utendi fruendi." Here the lessee had the *jus utendi*, for he had the exclusive right of using the land between high and low water mark. Again, wherever a view could be had of tenements, among *154] which are servitudes, an assize lay for the recovery of the rent, *and even a distress might be made upon a *servitus* for the rent of the *servitus*, provided it were practicable: Bracton, lib. 4, fol. 181. It has been said that assize lay in these instances only, because it was a speedy remedy; but Bracton, lib. 4, fol. 181, says, that it lies only where strictly applicable; and, therefore, if the complainant is ignorant of, or cannot describe his tenement, either in quality or quantity, or its local situation, the writ of assize of *novel disseisin* will not lie. The remedy by assize of *novel disseisin* was extended by the statute of Westminster, 2d. Lord Coke, in commenting on that statute, in 2 Inst. 412, observes, that Bracton, who wrote before the making of the act, says, that the assize lay for any common appurtenant to the freehold, as for common of pasture or of turbary; and then, "That in the reign of Henry III., which was before the making of that act, an assize did lie of common of piscary; and these opinions had great probability of reason, yet, because (as hath been said) there was no writ in the register in those cases, therefore, before this act, no writ did lie by the general opinion of the judges; but now this act hath cleared the question." And Bracton, when he mentions the writ of entry, *ad terminum qui præterit*, lib. 4, fol. 324, asserts, that it will lie for common of pasture, *dum tamen pastura fuerit certa et designata ad certum numerum averiorum*. These writs of entry, therefore, are applicable, the one to that interest in land stated in the special verdict, the other to that right of common which the same interest is admitted to resemble.

Then, the same consequences attach upon the demise of it as upon that of the corporeal hereditament. The lessee has acknowledged under his hand and seal that this appurtenant is part of the premises demised, in respect of which the rent is reserved. The power of distress is incident to and inseparable from rent *155] *service, and to that power there are no stricter limits than the following, which are given in Fleta, lib. 2, c. 49: "In qualibet captionem tria principaliter requiruntur, certus locus, certa causa, et seisinam alicujus." In the present case, all these three requisites concur. Littleton, sect. 58, does not confine the right of distress to lands, but says, "If the lessor reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the *tenements letten*." Lord Coke, in commenting on this passage, says, that the rent must be reserved out of the lands or tenements whereunto the lessor may have resort to distrain. The reason given by Lord Coke, therefore, why the rent should be reserved out of the lands and tenements is, that there should be a certain place to distrain upon. He afterwards proceeds to say, that a rent cannot be reserved by a common person out of an incorporeal inheritance, as tithes, &c.; but if lease be made of them by deed for years, it may be good, by way of contract, to have an action of debt, but distrain the lessor cannot." This dictum, that it is good by way of contract only, is at variance with what was said by the Court in *Bally v. Wells*, 3 Wils. 25, where tithes were held to be such an estate as would create a privity between the lessor and assignee, so as to make the latter liable upon a covenant running with the tithes. There, it was objected tithes were incorporeal, and could not support a covenant by the lessee thereof, to run with them, so as to bind the assignee. But the Court, in delivering judgment, says, "There seems to be no difference between an inheritance in *lands* and tithes as to this matter. Tithe is a tenth part of the profits of the *lands*; the profit of the land is the land itself; tithes are tangible and visible; may be put in view in an assize; an ejectment lies of them; a *præcipe quod reddat* lies of a

portion of tithes: a *warranty may be annexed to incorporeal inheritances: they have every property of an inheritance in land, except that [*156 they lie in grant, and not in livery." Those observations apply obviously to the nature of the interest which the lessee took in the space between high and low water mark. Again, beasts upon the common might, at common law, be distrained for the rent of the common. In the Year Book, 26 Hen. 8, p. 5, this case is stated, "In replevin defendant avowed that plaintiff and his ancestors, &c., had used to have common in certain acres of the defendant, for which rent was reserved at the festival of Christmas, which rent was in arrear, and avowed the taking. *Mervin*. Sir, it seems to me that the prescription availeth not, for he prescribes to distrain in his own soil, which would be inconvenient. *Fitzherbert*. It is a good prescription, and may have a lawful beginning: the soil is not charged with the distress, but only the beasts. Afterwards, on another day, Mervin moved Englefield on the same point, who said as Fitzherbert had said." In Gray's case, 5 Rep. 78, S. C. Cro. Eliz. 405, it was resolved that the lord might distrain cattle for the rent of a common on a common, although there was no prescription to distrain. In the Mayor of Northampton's case, 1 Wils. 115, Lee, C. J., seems to have thought that the owner of the soil might distrain even for stallage, provided the sum were fixed. These authorities show that there may be a distress for rent issuing out of an interest analogous to that which the lessee took under the indenture in the space between high and low water mark. The exclusive use found by the jury was inferred from those acts of enjoyment of which this soil is capable, such as making beds for the barges, clearing out the mud, &c. The interest of the tenant may be likened to the vesture of land which may be distrained upon: Co. Lit. 47 a; or to those particular *rights [*157 for any injury to which trespass will lie, as a right to the herbage; or a piscary, Co. Lit. 4, b, *Wilson v. Mackreth*, 3 Burr. 1824, *Welsh v. Myers*, 4 Campb. 368. These barges, although not "in and upon" the wharf ground, would have had no certain local habitation, but for the wharf ground to which they were attached. If these barges were lawfully distrained, when the privilege of being so attached only was demised (as the Court of Common Pleas decided in this very case, 4 Bing. 137), *a fortiori*, a distress of them is lawful when the tenants were in the occupation of the interest stated in this special verdict. They occupied the premises demised according to the mode of occupation of which they were capable.

Richards for the plaintiffs below. The defendants below could not, by law, distrain the barges while they were between high and low water mark, because a distress can only be made on the land out of which the rent issues, and here the rent did not issue out of the land between high and low water mark. That land was not demised, but only an exclusive right to use it. That was a mere easement. In Co. Lit. 47 a, it is said, "that it appeareth by Littleton, that a rent must be reserved out of the lands or tenements whereunto the lessor may have resort or recourse to distrain, as Littleton here also saith, and, therefore, a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodies, mulcture of a mill, tithes at fairs, markets, liberties, *privileges*, franchises, and the like. But if the lease be made of them by deed for years, it may be good by way of contract, to have an action of debt, but distrain the lessor cannot." Here the land between high and low water mark is not demised, but a mere right to use it. That is a privilege or easement, and consequently, no rent can *issue out of it. The 11 G. 2, c. 19, s. 8, enables the landlord to distrain any cattle feeding upon a [*158 common appurtenant to the land demised. At common law such cattle could not be distrained, because the soil of the common belonged to the lord of the fee; and the lessor of the land (to which the right of common is appurtenant) could not, therefore, enter on the common land to distrain. So, in this case, the soil of the land between high and low water mark belongs to the king. The lessor of the wharf, therefore, can have no right to distrain on that land, though he may have, as appurtenant to his own land, an exclusive right to

use the space between high and low water mark. There are cases where land having been demised for a term of years, and the lessee having had reserved to him a right of using part of the demised premises after the expiration of the term, his crops have been held to be subject to distress so long as they continued on the land, as in *Boraston v. Green*, 1 H. Bl. 5, and *Knight v. Bennett*, 3 Bing. 364. But in those cases the land itself on which the distress was made was originally demised, and not the mere use of it, as in this case.

Cur. adv. vult.

ALEXANDER, C. B. This is an action for trover for two barges, brought by the assignees of bankrupts of the name of Jones, against two defendants, who were bailiffs, duly authorized, of the person then entitled to the freehold of a wharf and premises in possession of the plaintiffs below, the assignees, and who had seized the two barges under colour of distress for rent arrear.

The distress was made upon the two barges lying in the river Thames, but attached by ropes to the wharf demised by the principal of these bailiffs, the defendants below, to the bankrupt now represented by the assignees. The question is, whether the distress is valid? There *is no doubt that the wharf

*159] was demised, that rent was in arrear, and the distress made. The controversy is, whether the barges were in a position which rendered them liable to be distrained upon.

It is necessary to examine the terms of the demise to determine the nature of the interest which the tenant took under the demise in the place where the barges were at the time of the distress, and then to decide whether by law, property in that place was liable to be distrained upon. The jury found a special verdict, where the terms of the demise are stated. In substance they are as follows: By indenture, Brown demised to the bankrupts all that wharf, ground, and premises next the river Thames, and also all that warehouse abutting north on the Thames, &c., together with license for them during that demise, to land and load goods in common with the rest of the lessor's tenants at Fivefoot Way Wharf; together with all easements and appurtenances to the said wharf and premises belonging or appertaining:—the special verdict then stated, that by the indenture the exclusive use of the land of the river Thames, opposite to and in front of the demised wharf, between high and low water mark, as well when covered with water as dry, was demised as appurtenant to the wharf, but that the land between high and low water mark was not demised. It has been observed that the special verdict is in this place erroneous and inconsistent with itself. It finds that the exclusive use of the land over which the river flows *was demised as appurtenant to the wharfs*, but that the land itself was not demised. This inconsistency has suggested to one of the Judges the propriety of a *venire de novo*. It is agreed that the finding is inconsistent, because a grant of the exclusive use of the land is a grant of the land. Therefore, the verdict finds that the land was demised, and that it was not demised. But still

*160] the majority of the Judges are of the opinion that there *is no occasion for a *venire de novo*: such a step would, in their opinion, occasion useless delay and expense. The jury have put a construction upon the instrument. The instrument is itself sufficiently set out upon the special verdict, and the Court can judge of its legal effect. They are now informed as exactly what the facts are as they could be by any amendment, and, therefore, do not deem it necessary that there should be a *venire de novo*. The special verdict then proceeds, "That on the 12th November, 1826, the sum of 555*l.* of the rent was in arrear and unpaid; and, that on that day, and at the time of making the distress thereafter mentioned, the two barges, the property of the plaintiffs as such assignees, were attached by ropes, head and stern, to the wharf ground aforesaid, and were lying and being on the part of the river Thames, opposite to, and in front of the said wharf, ground, and premises, and between high and low water mark, the exclusive use of which was demised as aforesaid; that the defendants on the said 12th of November, as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to

distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and shortly afterwards sold and disposed thereof to satisfy such arrears." Such is the verdict. Nothing is demised but the wharf, ground, and premises next the river Thames, and the capital built brick warehouse of three floors, erected and built thereon, together with the "cellars, sollars, rooms, chamberways, paths, passages, lights, easements, profits, commodities, advantages, and appurtenances whatsoever, to the said wharf, ground, warehouse, and premises belonging or appertaining."

What is demised, therefore, is the wharf, ground, and premises next the river, the warehouse and the easements and appurtenances thereto belonging. The jury tell us that it was as appurtenant that the *exclusive right to the use of the land in question, over which the barges were moored, passed [*161 to the lessee.

As it is an acknowledged rule, that land cannot be appurtenant to land, it follows that the jury drew a right inference from the deed when they found that the land itself between high and low water mark was *not* demised; and when they say that the *exclusive use* of the land was demised for the accommodation of the tenants of the wharf, they do not mean *exclusive use* in the sense which those words import, when they are held to pass the land itself. That would be contrary both to their own express finding, and to the manifest construction of the deed itself, set out upon the record. It may be assumed as a fact, therefore, that the land over which the barges were moored, was not demised, though the land to which they were attached was demised. The question then comes to be, whether by law a distress can be made upon property situated upon land which is not parcel of the demise—land of which the tenant has at most an easement.

It cannot be denied that the law is generally understood to be as laid down by the Lord Chief Baron Comyns in his Digest, title *Distress*, A 3; that, for rent reserved upon a lease, a man may distress upon any part of the land out of which the rent issues: evidently implying a negative: that he can distress no where else.

It would surely be vain to contend that the rent issued out of the soil of this navigable river. Much ancient learning has been ingeniously brought into action upon this occasion, to prove that a distress may be taken upon an easement or a right analogous to what the tenants are supposed to have had upon the river in this case. But none of the cases cited, when examined, warrant the proposition.

The total absence of all clear and direct authority upon such a point, is, I think, decisive against it. I do *not think it necessary to examine the dicta and cases which have been mentioned, in order to show that they [*162 fail in establishing the proposition for which they have been cited.

The exceptions to the rule that the distress must be upon the land, whether they are found in the common law, or introduced by statute, all prove the rule.

The right of the lord to follow when the cattle are removed *within his right*, when it is stated by my Lord Coke in the 1st Inst., 161, is put upon this, that in judgment of law they are at the time within his fee.

The statute of Anne, affording a remedy where the goods are carried off clandestinely; the stat. of G. 2, authorizing the landlord to distress cattle feeding upon common, appurtenant to the land demised; all these exceptions prove the rule that the distress must be made upon land out of which the right of the landlord issues.

There is no reason in justice for extending by subtilty the right of distraining beyond what the ancient law of the realm has established. If the law were as contended by the defendants below, the barges of a stranger moored there for a temporary purpose with their cargoes, might be seized; which would be unjust.

It has been said that a decision, that the right for distraining does not exist upon property situated as these barges were, would be dangerous to the commercial interests of the country. I am not able to discover the danger. The land-

lord will have his remedy by distress upon the premises really demised, and will have besides his remedy upon the contract.

If it be supposed that because the soil of the river cannot be demised by the owner of the adjoining wharf, the easement or privilege of attaching their barges to the adjoining wharf would be in danger, I must say I cannot discover the *163] consequence. If this be an *easement, as they say it is, to the benefit of which they are entitled, the law has the means of protecting men in their easements appurtenant to their lands as well as in the lands themselves. We are of opinion that the judgment should be affirmed.

I am desired to state, that the late Chief Justice of the Common Pleas, who heard this case argued, does not concur in the opinion I have delivered, but thinks that the judgment ought to be reversed; the majority, however, of the Judges are of opinion, that it ought to be affirmed, and let it be affirmed accordingly.

Judgment affirmed.

WALSH, Bart., and Another, Executors of Sir H. STRACHEY, v.
FUSSELL. July 8.

A covenant with a lessor of premises in a parish, to indemnify the parish against any paupers which the covenanter may cause to be settled in it, is valid.

THE plaintiffs declared in covenant, as executors of Sir Henry Strachey, upon an indenture of demise, bearing date the 12th March, 1792, and made between the said Sir Henry of the one part, and the said defendant on the other part, by which certain premises in the parish of Elm (of which it was alleged that Sir Henry was seised in fee) were demised to the defendant for a term not yet expired; and the said indenture contained a covenant by the defendant for himself, his executors, administrators, and assigns, that he did in and by the said indenture covenant, promise, and grant to and with the said Sir Henry, his heirs and assigns, amongst other things, that he the said defendant, his executors, administrators or assigns, should and would from time to time, and at all times there- *164] after, fully and clearly indemnify and save harmless the churchwardens and *overseers of the poor of the parish of Elm for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the said defendant, his executors, administrators, or assigns taking an apprentice or servant who should thereby gain a settlement within or become chargeable to the parish of Elm aforesaid; and then assigned, as a breach, that the defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm from all costs, by reason of his taking an apprentice or servant who should thereby gain a settlement, but, on the contrary thereof, he the said defendant, after the making of the said indenture, and after the death of the said Sir Henry, and during the continuance of the said term, to wit, on the 1st day of December in the year of our Lord 1826, took a certain servant, to wit, one William Lansdown, within the true intent and meaning of the said indenture, and the said William Lansdown, by reason of his being such servant to the said defendant, did gain a settlement within the parish of Elm aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid: and the said plaintiffs further said, that the said William Lansdown having so gained such settlement as aforesaid, did afterwards, to wit, on the 14th day of February, in the year of our Lord 1827, by reason of the premises, become chargeable to the said parish, and the overseers of the poor of the parish aforesaid for the time being, by reason thereof, as such overseers as aforesaid, were theretofore, to wit, on the day and year last aforesaid, and on divers other days and times between

that day and the commencement of this suit, forced and obliged to, and did necessarily pay, lay out, and expend *divers large sums of money, amounting in the whole to a large sum, to wit, the sum of 100*l.* in and about [*165 the necessary support, maintenance, and sustaining the said William Lansdown and his family, to wit, at the parish aforesaid, in the county aforesaid.

The defendant pleaded several pleas in bar, to which there was a demurrer and joinder; and the question which ultimately arose was, Whether the covenant were a valid covenant in law.

This case was argued twice; by *Wilde*, Serjt., for the plaintiffs, and *Stephen*, Serjt., for the defendant. The argument arising upon a demurrer to the pleas, the counsel for the plaintiff commenced and replied; but the case will be more intelligible here if it commence with the

Argument for the defendant. The declaration is ill on two grounds. First, the action does not lie for the plaintiffs as executors; secondly, the covenant on which they sue is void; as being unreasonable, in restraint of trade, and contrary to the policy of the poor laws.

1st, The testator of the plaintiffs, Sir Henry Strachey, having been seised in fee, the action ought to have been brought by his heir or devisee, who would be the persons, if any, entitled to damages for a breach of a covenant affecting the value of the land. The Mayor of Congleton *v.* Pattison, 10 East, 130, may seem to be an authority the other way; but in that case the covenant did not run with the land. It should appear also, that the party suing on such a covenant was the occupier of the land; for no one else could be damnified, the occupier alone being the person liable to pay poor rates. But,

2dly, The covenant is void. It is unreasonable that a lessor should prescribe to a lessee the mode in which *he is to conduct his business, or the quarter from which he is to engage his workmen, and to impose on him a [*166 liability for a term of unlimited duration. It would be impossible to predict at what distance of time the defendant might be called on in respect of such a covenant.

Such a stipulation is also illegal as being in restraint of trade. In *Colgate v. Bachelier*, Cro. Eliz. 872, and *Hartley v. Rice*, 10 East, 22, it is laid down that covenants which merely tend to restrain trade, or even to discourage it, cannot be supported in law. *Mitchel v. Reynolds*, 1 P. Wms. 181, has decided, that general restraints of trade are absolutely void, and even particular restraints, unless upon adequate consideration. If the consideration does not appear, or appears to be insufficient, the Court will presume that the restraint is unjustifiable. In the present instance the restraint is manifest, and no adequate consideration appears.

Then, the covenant is contrary to the policy of the poor laws. According to *Blackstone*, 1 Bl. Com. 352, settlements were given to encourage application to trades; so that if the covenant had the effect of preventing the defendant from hiring workmen out of other districts, they might be precluded from bettering their condition: if he hired them, notwithstanding the covenant, the overseers having no longer any motive for economy, would encourage pauperism by a lavish allowance.

Argument for the plaintiffs.

The action lies for the plaintiffs, the executors of the lessor, because the covenant is personal and does not run with the land: *Spencer's case*, 5 Rep. 16 a; *Bally v. Wells*, 8 Wils. 25; *Gray v. Cuthbertsen*, Selw. N. P. 498; *Canham v. Rust*, 8 Taunt. 237. Where *a seisin in fee is alleged, it is not necessary to show occupation; *Bullard v. Harrison*, 4 M. & S. 387; and though [*167 the occupier pay the rates, the lessor is damnified where their amount is increased, since they ultimately fall on the rent.

There is nothing unreasonable in the covenant, or in restraint of trade. It would have been easy for the defendant to have engaged workmen in such a way as not to confer a settlement; and even if that were impossible, if any increased liability were incurred, the defendant would doubtless obtain the premises at a

lower amount of rent. So that if there were any partial restraint, there is an adequate consideration for it; which, even according to *Mitchel v. Reynolds*, and *Homer v. Ashford*, 3 Bing. 322, is a sufficient answer to any such objection. But the Mayor of Congleton *v. Pattison* has decided, that an engagement to bear the burthen occasioned by the introduction of a manufacturing business, is no restraint of trade.

With respect to the poor laws, a pauper has no privilege to claim a settlement in one place rather than another; being entitled to relief wherever he is settled, the locality of his settlement, is, so far, a matter of indifference; and with respect to the overseers, although a covenant to pay a net sum in discharge of a parish liability be illegal, a contract of indemnity has never been holden ill.

TINDAL, C. J. The plaintiffs declared in covenant as executors of Sir Henry Strachey upon an indenture of demise, bearing date the 12th March, 1792, and made between the said Sir Henry of the one part, and the said defendant of the other part, by which certain premises were demised to the defendant for a term *168] not yet *expired; and the said indenture contained a covenant by the defendant for himself, his executors, administrators, and assigns, that he did in and by the said indenture covenant, promise, and grant to and with the said Sir Henry, his heirs and assigns, amongst other things, that he the said defendant, his executors, administrators, or assigns, should and would from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the said defendant, his executors, administrators, or assigns taking an apprentice or servant who should thereby gain a settlement within or become chargeable to the parish of Elm aforesaid; and then assigned as a breach, that the defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm from all costs by reason of his taking an apprentice or servant who should thereby gain a settlement, but on the contrary thereof, he, the said defendant, after the making of the said indenture, and after the death of the said Sir Henry, and during the continuance of the said term, to wit, on the 1st day of December, in the year of our Lord 1826, took a certain servant, to wit, one William Lansdown, within the true intent and meaning of the said indenture, and the said William Lansdown, by reason of his being such servant to the said defendant, did gain a settlement within the parish of Elm aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid, and having gained such a settlement became chargeable to the parish of Elm. *169] The defendant pleaded several *pleas in bar, to which there was a demurrer and joinder; and the question which ultimately arose was, Whether the covenant was a valid covenant in law?

It was contended, on the part of the defendant, first, that the plaintiffs had no interest which would authorize them to maintain an action; secondly, that the covenant was void; on the ground that it was unreasonable, that it was in restraint of trade, and that it was against the policy of the poor laws, inasmuch as it took away from the overseers any reason for economy, and was injurious to the poor themselves. But we do not think any of the objections maintainable; for, as to the first, the covenant being an express covenant with the lessor, and not being a covenant running with the land, an action lies for the breach thereof in the name of the personal representative of the covenantee, who becomes a trustee for the persons, whoever they may be, who are beneficially interested in the performance of the covenant. And as to the objections to the covenant itself, we do not think any of the consequences above stated flow so naturally and necessarily from the observance of this covenant as to call upon the court to hold it to be void. It is not contended that the covenant is illegal on the ground of the breach of any direct rule of law, or the direct violation of any

statute; and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. But such is not the case. There is nothing in the covenant which will prevent the poor generally from being employed by the defendant; he may employ as a servant or an apprentice the poor of that parish, who may be sufficient for the service of the mill; he may employ in those capacities the poor who have settlements in other parishes, but who have certificates from those parishes; *or he may, [*170 in the case of servants, hire them for a smaller term than a year, and thereby prevent them altogether from gaining a settlement. There is, therefore, no general restraint of the poor from being employed in the service of the defendant in this parish. And as to any abstract right in a pauper to obtain a settlement in any parish he chooses to select, as he must have a settlement somewhere, the law will not consider a settlement in one parish rather than another as any benefit to the poor. If the objections urged in this case had been entitled to weight, we think they would not have been omitted in the *Mayor of Congleton v. Pattison*; for although the question in that case was, whether the covenant ran with the land or not, this objection would at once have put an end to the action. And in the case of *Hill and Others v. Eastaff*, which was argued in B. R., in Easter term, 1819, where an action of debt was brought upon a bond conditioned that the obligors, who were the churchwardens and overseers of one parish, should indemnify the obligees, who were the churchwardens and overseers of another parish, and all the inhabitants of that parish, from all costs, charges, and expenses which might be incurred by the latter parish, by reason of one Stevenson having put himself apprentice to one Moor in the latter parish, the court gave judgment for the plaintiff; and some of the objections above raised would have applied as well to his case as to the one before us. Upon the whole, we think the judgment in this case should be given for the plaintiffs.

Judgment for the plaintiffs.

*PARTINGTON v. WYATT. June 27.

[*171]

Where a rule for judgment as in case of a nonsuit, is discharged upon a peremptory undertaking, costs incurred at the sittings, in consequence of notice of trial, are not allowed, unless mentioned in the rule.

A RULE for judgment as in case of a nonsuit for not proceeding to trial in this cause, had been discharged on Saturday, May 30th, upon the plaintiff's giving a peremptory undertaking to try at the next sittings. In the rule there was no mention of costs.

On the ensuing Monday, by consent, the rule was drawn up as follows:—
“Partington, Gent., one, &c., v. Wyatt. Upon reading a rule made in this cause on Friday, 22d instant, and the affidavit of William Partington, the plaintiff in this cause, and upon hearing counsel for both parties, it is ordered, that the said rule be, and the same hereby is discharged, the plaintiff by his counsel hereby undertaking peremptorily to proceed to the trial of this cause at the sittings after next Trinity term, to be holden at Guildhall, in and for the city of London. And it is further ordered, that the said plaintiff do and shall pay to the said defendant, or his attorney, costs, to be taxed by one of the prothonotaries of this Court, for the plaintiff's not proceeding to the trial of this cause at the sittings after Hilary term, 1827, and also at the sittings after Michaelmas term last, pursuant to notice given, unless the said plaintiff, after notice of this rule to be given to his attorney or agent, shall show sufficient cause to the said prothonotary to the contrary at the time of such taxation.”

The circumstances of the case were inquired into by the prothonotary, and upon a due hearing he refused to allow the defendant the costs incurred by him

*172] and his witnesses during six days' stay, at the sittings (at the end *of which time the plaintiff withdrew his record), or the costs of the briefs delivered at the sittings.

Upon an affidavit of these facts,

Taddy, Serjt., obtained a rule *nisi* for the prothonotary to review his taxation, and allow the defendant all the costs incurred by his attending the sittings.

Bompas, Serjt., who showed cause, relied on the circumstance that by the terms of the rule the costs were left in the discretion of the prothonotary, as he was only to allow them in case the plaintiff did not show a sufficient cause to the contrary: and as he had decided on a hearing, it must be presumed sufficient cause had been shown. Further, he contended that costs incurred at the sittings could not be given upon a rule for judgment as in case of a nonsuit discharged upon a peremptory undertaking. Such costs could only be obtained on a rule for costs for not proceeding to trial pursuant to notice.

Taddy. The discretion of the prothonotary was to be exercised only as to the *quantum*, not as to the right to costs; and the defendant is entitled to obtain the costs of the sittings on a rule for judgment as in case of a nonsuit; otherwise the parties must be put to the expense of two rules instead of one.

By the rule of Trinity term, 13 G. 2, 1789, "It is ordered by the Court, that from and after the last day of this term, where notice is given of the execution of a writ of inquiry and not countermanded in time, the defendant shall be entitled to costs from the plaintiff for not executing such writ of inquiry, *in the same manner as the defendant by the course of the Court is now entitled to costs from a plaintiff who does not proceed to the trial of an issue joined after notice given*." And *such costs were allowed in *Jones dem. Wyatt v. Stephenson*, Barnes, 316, *Kettle v. Bromsale*, Id. 230. Such also is the practice of the Court of King's Bench.

In *Impey's Common Pleas* it is stated, "It has been determined, and is now the practice of this court, that if the defendant obtain a rule for costs for not going to trial, he shall not have a rule for judgment as in the case of a nonsuit: *Ogle v. Moffat*, Barnes, 133, 316. But if any subsequent laches is made, a judgment as in case of a nonsuit, may then be applied for; and as those costs are always allowed in the latter rule, there does not seem any necessity ever to move for the former one."

TINDAL, C. J. When the rule of Saturday, May 30th, was moved for, nothing more passed than would authorize the drawing up the rule in the ordinary form, which is, that the rule be discharged on a peremptory undertaking to try. It appears that on the Monday following, a special rule was drawn up by consent, in which the costs were left in the discretion of the prothonotary, who, upon hearing both parties, has refused to allow any: either way, therefore, the party is in the same state, and there is no ground for the interference of the court.

PARK, J. We are desired to insert in the rule, words which are not there. The prothonotary did hear the parties according to the rule; and in his judgment, a sufficient cause was assigned for not allowing the defendant the costs in question. We cannot yield to this application.

BURROUGH, J., concurred.

*GASELEE, J. This is in the usual form: and the prothonotary did *174] hear and decide. Perhaps, for the future, it should be part of the rule that the costs of the sittings shall be borne by the plaintiff upon inquiry by the prothonotary as to their amount. Rule discharged.

DOE dem. HAMMOND, PETTY, MULES, and WOODLEY, v. COOKE
and Another. *July 6.*

In favour of a defendant in ejectment, who showed no title to the premises sought to be recovered, the Court would not presume a surrender of a mortgage term to the owner of the inheritance, from the circumstance, that, in 1802, the Court of Chancery had decreed a sale of the mortgaged property for the payment of the money borrowed, and that some sales had taken place under the decree: But the defendant had not purchased the land in question under the decree, and there was no evidence of any further proceedings in Chancery.

THIS was an act of ejectment brought upon several demises, against Joseph Cooke and John Newton.

At the trial the jury found a verdict for defendant Newton, and for the plaintiff, against Cooke, as to so much of the premises as were in his possession; and, upon a motion being made for leave to set aside the verdict and enter a nonsuit, on the ground that the legal estate was not in any of the lessors of the plaintiff, but was in certain trustees under the will of Mr. Middleditch, named Mangles and Taddy, in whom no demise was laid, the facts were directed by the Court to be stated in a special case.

It appeared by that case, that the premises in question, amongst others, were conveyed by indentures of lease and release of August 1793, to the use of Lubbock and Clarke, for the term of 600 years, upon trust by mortgage or sale, to raise the sum of 15,000*l.*, or so much thereof as Mr. Middleditch should by deed or will direct, and subject thereto, to certain uses therein mentioned, with the ultimate remainder in fee to the use of Mr. *Middleditch and his [*175 heirs; the deed of release containing a clause of cesser of the said term of 600 years, after full payment of the moneys raised under it, and of the costs and expenses of the trustees. And it appeared further, that by a deed of assignment of the 26th March, 1794, Lubbock and Clarke, the trustees, by the direction of Middleditch, who was a party to the same, assigned the premises in question, amongst others, to Charles Hammond, to hold for the said term of 600 years, subject to a proviso for redemption on payment of the sum of 6000*l.* and interest.

It was further proved that Mr. Middleditch, by his will, dated in November 1798, devised all his real estates to Mangles and Taddy, and their heirs, upon trust, to sell so much thereof as was necessary to pay all moneys due upon mortgage of any part of his estate, and all his debts and legacies, and as to the residue, in trust, for the separate use of his wife, her heirs and assigns; and that he died in the year 1799.

One of the demises was laid in the names of Petty, Mules, and Woodley, the trustees named in the will of Mrs. Middleditch, afterwards Mrs. M'Kenzie; and one other demise was laid in the name of Elton Hammond, who was the personal representative of Charles Hammond the mortgagee.

The defendant, Cooke, proved, that in 1799, a suit was instituted in the Court of Chancery for carrying the will of Mr. Middleditch into effect; in which suit, amongst other persons, Charles Hammond the mortgagee was a party, and that by certain decretal orders made in 1801 and 1802, it was ordered (amongst other things) that moneys should be raised by sale or mortgage of the estate, and that what was found due on the mortgage should be paid to the mortgagee, and all further directions and costs were reserved until after sale of the estates.

*No evidence was given as to any further proceedings in the Chancery suit, nor was any evidence given by Cooke of any title to the premises [*176 sought to be recovered, though it was proved that some sales took place under the decree, and that he, Cooke, had bought certain lots, not appearing, however, to form any part of the premises in question.

Wilde, Serjt., for the lessors of the plaintiff. On the part of the defendant, Cooke, the Court is called on to presume that the mortgage money advanced by Hammond in March 1794 has been paid off, and that the term assigned to him to secure it, has either ceased under the proviso of cesser, or has been surren-

dered to the owners of the inheritance, so as to be merged in the fee now vested in Mangles and Taddy, the trustees under Mr. Middleditch's will. In order, however, to raise the presumption of the surrender or cesser of the term, the defendant ought, at least, to have shown the payment of the money; for it was not for the lessors of the plaintiff to prove the negative, and show that the money had not been paid. But proof of payment would not have been sufficient. The defendant is not owner of the inheritance, nor does he claim under him: and an outstanding term always enures to the benefit of the owner of the inheritance, or those who claim under him; *Cholmondeley v. Clinton*, Sugd. V. & P. 425; in favour of whom the courts have sometimes directed juries to presume a surrender of a term; never against them. In *Doe v. Wright*, 2 B. & A. 710, the contest was between parties, both of whom claimed as heirs at law; and in *Doe v. Hilder*, 2 B. & A. 782, between a tenant by *elegit*, and another creditor to whom a mortgage had been made by way of unfair preference, Lord Eldon and *177] Richards, C. B., disapproved of the ruling in that case (*Aspinall v. *Thomson*, Sugd. V. & P. 445), and the defendant afterwards recovered by showing there had been no surrender. In all the other cases the presumption has been in favour of the owner of the inheritance, and never against him; *Goodtitle v. Jones*, 7 T. R. 47, *Doe v. Syborn*, 7 T. R. 2, *Roe v. Reade*, 8 T. R. 118, *Emery v. Grocock*, 6 Madd. 54, *Townsend v. Champernown*, 1 Young & Jarr. 538, unless where he has attempted to defeat his own acts, as in *Bartlett v. Downes*, 3 B. & C. 616.

At any rate, the Court will not make a partial presumption; if they presume that the mortgage to Hammond has been paid off, they will presume that all the other debts have been paid and all the trusts executed, in which case the estate would be in Petty, Mules, and Woodley, the trustees under the will of Mrs. Middleditch.

Mr. ewether, Serjt., *contra*. There is enough in the present case to justify the presumption of a surrender of the term to the owners of the fee. No title is shown in the lessors of the plaintiff. They all claim ultimately under trustees, who took from Middleditch in trust to concur in the sales ordered in the suit in equity, to which Hammond, the mortgagee, was himself a party. In that suit, as long since as 1801, the property is dealt with as vested in Mangles and Taddy, which could not have been the case if the term of 600 years had not ceased. There is, therefore, ample ground for presuming that it had been surrendered; that the mortgage money had been paid; and that the defendant purchased under the authority of the Court.

Wilde. If the proceedings in Chancery had ever terminated, it would have *178] been easy for the defendant to *have shown that fact; and it would be extravagant to presume satisfaction from the mere existence of a Chancery suit. *Cur. adv. vult.*

TINDAL, C. J. (After stating the case, as *ante*);—

One of the demises was laid in the names of Petty, Mules, and Woodley, the trustees named in the will of Mrs. Middleditch, afterwards Mrs. Mackenzie, and one other demise was laid in the name of Elton Hammond, who was the personal representative of Charles Hammond the mortgagee.

It is obvious, therefore, that the objection taken by the defendant Cooke cannot prevail, unless it can be shown that the term of 600 years created in 1794 had either ceased under the proviso of cesser, or had been surrendered to the owners of the inheritance; for if the term is still outstanding, the plaintiff may recover on the latter demise.

In order to lay the foundation for a presumption that the term had so merged, the defendant Cooke proved, that in 1799 a suit was instituted in the Court of Chancery for carrying the will of Mr. Middleditch into effect, in which suit, amongst other persons, Charles Hammond, the mortgagee, was a party, and that by certain decretal orders made in 1801 and 1802, it was ordered (amongst other things) that moneys should be raised by sale or mortgage of the estate, and that what was found due on the mortgage should be paid to the mortgagee;

and all further directions and costs were reserved until after sale of the estates.

No evidence was given as to any further proceedings in the Chancery suit, nor was any evidence given by Cooke of any title to the premises sought to be recovered: though it was proved that some sales took place under the decree, and that he, Cooke, had bought *certain lots, not appearing, however, to form any part of the premises in question. [*179]

In this state of things the Court is called upon to say that the jury ought to have presumed that the mortgage money was paid off, and that the term had either ceased under the proviso, or had been surrendered to the owners of the inheritance, so as to be now merged in the legal estate vested in Mangles and Taddy, the trustees under Mr. Middleditch's will.

The question is, whether such presumption ought to be made? and we are all of opinion that, under the circumstances stated in this case, it ought not.

No case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form.

In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed.

Thus in *Lade v. Halford*, Bull. N. P. 110, Lord Mansfield declared, that he and many of the Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee or a satisfied term set up by a mortgagor against a mortgagee, but that they would direct the jury to presume it surrendered. So, in *England v. Slade*, 4 T. R. 682, where the lessor of the plaintiff claimed under a lease from John Pym, and it appeared that the estate had been devised by John Pym's father to trustees, in trust to convey to John Pym on his coming of age, and in the mean time for his maintenance, it was held, that, though John Pym only came of age in 1788, and the trial took place in March 1791, the jury might presume a *conveyance to John Pym from the trustees, which it was their duty to make, and what a court of equity would have compelled. [*180]

And where the same facts arose in the case of *Doe d. Bowerman v. Sybourn*, 7 T. R. 2, Lord Kenyon said, that in all cases where trustees ought to convey to the *beneficial owner*, he would leave it to the jury to presume, where such a presumption could reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form.

Again, in *Doe v. Hilder*, the surrender of a mortgage term was directed to be presumed in favour of a judgment creditor, who had seized the land in question under an *elegit* taken out upon a judgment obtained against the owner of the inheritance.

And, lastly, in *Doe v. Wright*, the presumption was in favour of the person who was proved to be heir at law, against the defendant claiming, but failing in proving himself to be the heir.

In all these cases the presumption has been made in favour of the party who has proved a right to the beneficial ownership; the possession has been consistent with the existence of the surrender required to be presumed, and has made it not unreasonable to believe that the surrender should have been made in fact; and the presumption has been made accordingly, in order to prevent justice from being defeated by a mere formal objection.

But here we are called upon to declare the presumption ought to have been made in favour of a person who has proved no right to the possession, no title, no conveyance; a person who stands upon the mere naked possession, without any evidence how or when he acquired it. And what is stronger against the defendant, he lays before the jury only a partial statement of the *ground of presumption, for he proves only the commencement of the proceedings in equity, without showing their termination. [*181]

Under these circumstances, the Court think the defendant has not placed himself in a condition to call for any presumption in his favour, inasmuch as, for anything that appears to the contrary, the presumption which is asked for would rather tend to defeat than to promote the ends of justice. We, therefore, think the verdict should remain for the plaintiffs.

Postea to the plaintiffs.

HALL and Others v. CECIL and JOHN REX. June 23.

One who admits he is liable in respect of a claim on which an action is brought, is nevertheless incompetent to be a witness in the action; for though contribution in respect of the claim advanced be ultimately against his interest, he has a stronger immediate interest to defeat the action or lessen the damages.

ASSUMPSIT by a schoolmistress for instructing the defendants' sisters.

At the trial before Park, J., Middlesex sittings after Easter term, the plaintiffs put in a bill of exchange, to which Cecil and John Rex were parties, and gave some other evidence of their undertaking.

The defendants proposed to call as a witness their brother George Rex, who admitted himself to be a co-contractor, but Park, J., rejected him as an interested witness.

A verdict having been given for the plaintiffs,

Andrews, Serjt., obtained a rule nisi for a new trial, upon the ground, among others, that the testimony of George Rex ought to have been admitted, as adverse to his own interest.

Wilde, Serjt., showed cause. Although it might ultimately be against the interest of the witness to admit that he was responsible for his sister's instruction, yet, as *182] he would be liable to his brothers for contribution for costs, he had an immediate interest in defeating this action, or lessening the damages; and so certain and immediate an interest ought, in the estimation of his competency, to preponderate against a contingent or remote liability. In *Jones v. Brooke*, 4 Taunt. 464, in an action by an endorsee against the acceptor of a bill, which had been accepted for the accommodation of the drawer, the drawer was holden not to be a competent witness for the defendant to prove that the holder took the bill for a usurious consideration. And in *Goodacre v. Breame*, Peake, N. P. C. 175, in an action of *assumpsit* for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and J. S., who were partners in trade, Lord Kenyon held that J. S. could not be a witness for the defendant to prove that the goods were sold to himself; for by discharging the defendant he benefited himself, as he would be liable to contribute to the plaintiff's costs.

Andrews. Between the two conflicting interests the witness stood indifferent.

TINDAL, C. J. Assuming that George Rex was a co-contractor, he would have been liable to his brothers for contribution to the cost and damages occasioned by this action; he therefore had clearly an interest to defeat the action or reduce the damages, and was properly rejected.

PARK, J., and BURROUGH, J., concurred.

GASELEE, J. The cases have decided that liability to contribute to the costs is sufficient to render the witness incompetent.

Rule discharged.

*WILLANS v. TAYLOR. July 2.

[*183]

In an action on the case for a malicious prosecution, the plaintiff is to give *prima facie* evidence of want of probable cause, which the defendant may rebut, if he can, by showing the existence of probable cause.

Defendant presented two bills for perjury against the plaintiff, but did not appear himself before the grand jury, and the bills were ignored.

He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till plaintiff, taking the record down to trial, and defendant declining to appear as a witness, although in court, and called on, plaintiff was acquitted : Held, sufficient *prima facie* evidence of want of probable cause.

CASE for a malicious prosecution. Willans had sued Taylor, and had recovered a verdict against him, in an action for treble the amount of money lost at play.

Upon the trial of this action Willans had deposed, among other things, that he had lost money seventeen times, and that he had played at Taylor's on Good Friday.

Taylor then presented to the grand jury at the Westminster sessions two bills for perjury against Willans, but did not himself appear before the grand jury, and both the bills were ignored.

He then went to the King's Bench, and having himself appeared before the grand jury, a bill was found in which the chief assignments of perjury were, that Willans had not lost money seventeen times, and that there had been no play on Good Friday. Willans's bail was refused, and he was otherwise harassed.

This indictment was by various means kept suspended for three years, when Willans himself took the record down to trial. Taylor was present in court, and was called, but did not appear as a witness, and the jury, after a short pause, acquitted Willans.

Willans then commenced against Taylor this action on the case for a malicious prosecution; and at the trial before Lord Wynford, Middlesex sittings after Easter term, the facts above stated were proved on his part.

*Taylor called witnesses to show that his house was shut up on Good Friday, and that Willans had not lost money seventeen times. [*184]

Willans, among other witnesses, had called Mr. Gurney, the short-hand writer, to prove that Taylor was present at the trial of the indictment for perjury; but as Mr. Gurney could not speak to that fact, he was not examined on the part of Willans. The counsel for Taylor, however, cross-examined him at great length, and caused him to read his notes of what passed at that trial. The learned Chief Justice said this evidence should go for nothing; but he thought there was not sufficient evidence to show that Taylor had acted without probable cause, and directed a nonsuit.

Cross, Serjt., obtained a rule *nisi* for a new trial, on the ground that the absence of probable cause in the prosecution of perjury was a mixed question of law and fact, in which it ought to have been left to the jury at least to find the fact; and also on the ground that Mr. Gurney had been allowed to depose to the testimony of witnesses who ought themselves to have been called.

Taddy and Wilde, Serjts., showed cause. In order to sustain an action like the present, it must be shown that the defendant proceeded with malice, and without probable cause. And it lies on the plaintiff to show that the defendant proceeded without probable cause, not for the defendant to show that he had probable cause. Sutton v. Johnstone, 1 T. R. 493, 545; Arbuckle v. Taylor, 3 Dow's Parl. Rep. 160.

Neither can want of probable cause be implied from evidence of the most express malice. In Incedon v. Berry, 1 Campb. 203, n., the plaintiff gave in evidence expressions of the defendant indicative of express malice, and there *closed his case; and Le Blanc, J., ruled that some evidence (though under [*185 the circumstances slight evidence would be sufficient) must be given on the part of the plaintiff of want of probable cause, before the defendants could be called on for their defence. In Wallis v. Alpine, 1 Campb. 204, n., it was holden that the circumstance of the defendant's not having appeared as a witness

on the prosecution of the plaintiff, and his consequent acquittal, was not sufficient to show an absence of probable cause; and in *Purcell v. M'Namara*, 9 East, 361, the same circumstances were esteemed insufficient to establish malice. In the present case there is no evidence to show an absence of probable cause for the prosecution instituted by the defendant. The mere acquittal of the plaintiff can have no such effect, since there may often be great reason for prosecuting, although conviction be a matter of uncertainty; and the circumstance that the jury hesitated shows that they at least thought there was some ground for prosecution.

Cross. Taking the law to be as stated, here is abundant evidence of want of probable cause; and the case should have gone to the jury. It would have been sufficient if some only of the charges were malicious, and without probable cause. *Reed v. Taylor*, 4 Taunt. 616, *Farmer v. Darling*, 4 Burr. 1771.

The circumstance that two bills were ignored when the defendant did not appear; that a bill was afterwards found on his testimony; that he declined to appear, though called, and that in the absence of his testimony the jury acquitted, are sufficient to show that no one could make any charge against the *186] plaintiff but himself, and that he had no charge to make which he dared to *support in open court. Even the evidence that Taylor's house was closed on Good Friday was compatible with the statement of money having been lost on that day, as the playing was probably continued from the Thursday night.

Andrews, Serjt., on the same side, was stopped by the Court.

TINDAL, C. J. The rule must be made absolute. This is an action for indicting the plaintiff without probable cause. It is true, as admitted on both sides, that, in order to support such an action, there must be a concurrence of malice in the defendant and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action; for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause. What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused.

One question has been debated on the present occasion,—Who is to decide what shall be esteemed probable cause? That is a question of law for the judge, as it arises from the facts disclosed; and if there be any discrepancy in the *187] testimony, or *imputations on the credit of the witnesses, those are matters for the decision of the jury; so that, as in questions touching reasonable notice and the like, the judge must pronounce his opinion on the facts when found by the jury.

The other question which has been discussed is, who is to show the absence of probable cause?

The plaintiff must take the first step; because it is not to be presumed that any one has acted illegally. There must, therefore, be *some* evidence of want of probable cause before the defendant can be called on to justify his conduct.

Then, was there evidence in the present case sufficient to call on the defendant to prove affirmatively that he had probable cause for prosecuting the plaintiff?

I am of opinion there was.

The first bills against the plaintiff at the Middlesex sessions were thrown out when the defendant did not appear before the grand jury. Another was afterwards preferred; the defendant went before the grand jury, and the bill was found. He must, therefore, have thought himself an important witness for the

crown. And where the facts lie in the knowledge of the defendant himself, he must show a probable cause. But when the trial came on, although he was in court, he absented himself just when he ought to have delivered his testimony, and the plaintiff was immediately acquitted. The main facts in question must have been known to the defendant: the plaintiff had originally sworn that he had lost money to the defendant on certain days. The defendant, however, did not choose to submit to examination, but left the court at the moment he was about to be called. We must infer, therefore, that he had some knowledge which he did not choose to disclose; and his conduct on the occasion is sufficient *prima facie* evidence of want of probable cause to throw it on him [*188 to prove affirmatively in the present case that he *had* probable cause.

The short-hand writer's evidence of what the witnesses said on the former occasion was not admissible. Testimony was received in this cause not on oath in this cause, and the witnesses themselves might have been called. There must be a new trial.

PARK, J. I am of the same opinion. A great deal of the difficulty of these cases has been removed by the decision of *Sutton v. Johnstone*. The true distinction was there laid down by Lord Mansfield, who says, "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable or not probable are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law." 1 T. R. 545. From that case down to *Davis v. Russell*, 5 Bingh. 354, the courts have always decided in the same way. It must, no doubt, be ascertained whether or not the jury believe the witnesses; but if they do, and the facts are found, the judge is to determine whether or not they amount to probable cause. Nor can there be much difficulty on the question, who is to offer the first proof. Le Blanc, J., said, in *Purcell v. M'Namara*, "An action for a malicious prosecution cannot, from the very nature of it, be maintained without proof of malice, either express or implied; and malice may be implied from the want of probable cause; but that must be shown by the plaintiff." And, according to all the judges, that is the law of the land. Lord Ellenborough, indeed, held in *Wallis v. Alpine*, that mere omission to proceed with a prosecution is not sufficient to establish want of probable cause. And Lord Kenyon ruled the same in *Sykes v. Dunbar*, 13 East, 363, cited in *Purcell v. Macnamara*. But slight evidence is sufficient to throw on the other side the *onus* of showing that there was probable cause. And where, as in the present case, the facts lie in the knowledge of the defendant himself, he must show a probable cause. Buller's Nisi Prius, pp. 13, 14. [*189

In the present case, are all the circumstances together sufficient to throw the burthen of proof on the defendant?

He prefers bills against the plaintiff, on which he does not appear as a witness, and they are thrown out. He prefers another on his own testimony, and it is found. He refuses the plaintiff's bail; suspends the proceedings for three years; and then, at the trial, absents himself. Who could explain the testimony which induced the grand jury to find the last bill but himself? and yet he disappears, and the plaintiff is acquitted.

The short-hand writer's notes ought not to have been read, although the learned Chief Justice admitted they would weigh nothing. This rule, therefore, must be made absolute.

BURROUGH, J. What shall be deemed probable cause is in every case a question for the judge. But there is ground enough here for granting a new trial. The short-hand writer's notes ought not to have been read; and when one grand jury ignored bills against the plaintiff in the absence of the defendant, and another found a bill on his testimony, and the plaintiff was ultimately acquitted on the defendant's withdrawing himself from the court when he ought to have given his testimony, there was enough to call on him to show he had probable cause for the prosecution.

*190] *GASELEE, J.* The chief question here is, whether there was such insufficient evidence of want of probable cause as to warrant the learned Chief Justice in directing a nonsuit. I think there was not. A first indictment against the plaintiff had failed for want of the defendant's evidence; a second had been found on his testimony. It must be inferred, therefore, that he was a material witness; and though abandoning a prosecution be not of itself proof of want of probable cause, yet where, as here, it is persisted in for three years, and then dropped in the very hour of trial, there is strong ground for supposing that the prosecutor had no justifiable reason for commencing. The main question here was not whether there had been play on Good Friday, but whether the plaintiff had lost money sixteen times; on which subject probably the defendant did not like to be examined. His withdrawing from the trial, and the studied delay in his proceeding, are sufficient to throw it on him to show he had probable cause.

Rule absolute.

MICHENSON *v.* BEGBIE and Others.—*July 7. (a)*

The plaintiff, by charter-party, agreed with G. to convey corn at 4s. 6d. a quarter. G. made a sub-charter with S., who consigned corn to the defendants under bills of lading, by which they were to pay 6s. a quarter freight, and gave them notice to retain 1s. 6d. a quarter for him: The plaintiff having sued for freight at 6s. a quarter: Held, he was entitled to recover only 4s. 6d.

ASSUMPSIT for freight.

The plaintiff, as owner of the ship *William Peile*, had entered into a charter-party with Sack and Bremers, ship-brokers in London, as agents for Gerlack, at *191] Dantzie, that the *William Peile* should proceed to *Dantzie, and there take in a cargo of wheat for London, at 4s. 6d. a quarter.

When the ship arrived at Dantzie, Gerlack had no cargo ready; whereupon the captain went on 'Change, and bargained with one Soermans to take 709 quarters of wheat at 6s. a quarter. The captain signed bills of lading, by which this wheat was to be delivered to the defendants or their assigns, "they paying freight for the said goods, 6s. per quarter." There was no reference to the charter-party on these bills of lading.

It did not appear whether the captain had made this bargain as agent of the plaintiff or of Gerlack, but a sub-charter-party was entered into between Gerlack and Soermans. The precise time, however, at which this was executed was not proved.

The wheat having been delivered to the defendants, the plaintiff claimed freight from them according to the bills of lading, at 6s. a quarter, which the defendants, ignorant of Soerman's claim, at first promised to pay. Ultimately they paid at the rate of 4s. 6d. a quarter, and refused paying the other 1s. 6d. a quarter on the ground that it had been attached in their hands by Soermans, who had given them notice that the plaintiff was only entitled to 4s. 6d. a quarter. The attachment, however, having been dissolved by the putting in of bail, the plaintiff brought this action to recover freight at the rate of 6s. a quarter.

A verdict having been taken at the London sittings after Easter term for the whole amount, subject to a motion to set it aside and enter a nonsuit or verdict for the defendants,

Wilde, Serjt., obtained a rule *nisi* accordingly, on the ground that the plaintiff could not recover more than he had stipulated for by charter-party with Gerlack.

*192] *Jones, Serjt.*, showed cause. After commenting upon and contesting the sufficiency of the evidence to show that the captain made the sub-contract on the part of Gerlack, he argued, that, assuming the sub-contract to have been duly proved, the bills of lading having been made out at one entire

freight, and the defendants having received the goods and promised to pay the freight, they could not set up the charter-party between the plaintiff and Gerlack, to which they were not parties, as an excuse for not doing so. The plaintiff proceeded on a new contract, the bills of lading, in which the defendants were named, and which were binding on them if they accepted the cargo. In *Cock v. Taylor*, 13 East, 399, *Roberts v. Holt*, 2 Show. 443, and *Lear v. Yates*, 3 Taunt., 387, it was holden that the receipt of a cargo implied a promise to pay freight. In *Sodergren v. Flight*, 6 East, 621, 622, and *Bell v. Kymer*, 3 Campb. 545, the same liability was holden to attach to the endorsee of a bill of lading; and the circumstance that the freight was agreed for by a sub-contract in the present case, would not exonerate the defendants. In *Ward v. Felton*, 1 East, 507, the defendant was not so much endorsee of the bill of lading, as agent to the consignee, and was known to be acting as agent by the master of the plaintiff's ship. *Artaza v. Smallpiece*, 1 Esp. 23, where Lord Kenyon said that the consignee of goods is liable to freight, and not the person to whom he sells them, was overruled by *Cock v. Taylor*, and *Bell v. Kymer*. In *Moorsom v. Kymer*, 2 M. & S. 303, there was no contract on the part of the defendant, the question being concluded by the peculiar terms of the charter-party. In *Pinder v. Wilks*, 5 Taunt. 612, the defendants were neither consignees nor holders of the bill of lading. The defendants here, therefore, were liable to the plaintiff on the bills of lading, and could not enter into the question as to his engagements with other persons. If Soermans or Gerlack had any right to the 1s. 6d. additional freight, it could only be on a claim between them and the plaintiff: with him they must settle their differences; the defendants could never incur any risk by paying the ship-owner his freight according to the bill of lading.

TINDAL, C. J. I think this rule ought to be made absolute. It is clear the plaintiff has obtained all he ever bargained for, that is, all he was to have under the charter-party; and he now seeks to recover what belongs to others under a more advantageous bargain, which has been sufficiently proved. All the cases cited are cases in which there was no second party intervening: here notice was given to the defendants, by the parties entitled to the additional freight, not to pay it to the plaintiff. The promise made by the defendants, being made in ignorance of the rights of those who were really entitled, is not binding on them. The plaintiff has received all that was due to him under his own contract, and he has no more right to the sum bargained for under the second contract, than a lessor would have to claim from an under-lessee a higher rent reserved by the lessee.

PARK, J. I cannot comprehend the difficulty. Is there anything to prevent a man who has chartered a ship from letting it to another at a higher rate? How is the plaintiff injured, if paid at the rate he agreed for, by another person's obtaining a higher rate for the same voyage? The cases cited have no application to the circumstances of the present.

BURROUGH, J. The only question has been, whether one man is to recover another man's money?
Rule absolute.

*EARL OF SHREWSBURY v. HAYCROFT. July 8. [*194

Service of a writ directed to the chamberlain of Chester, is irregular without his mandate to the sheriff.

THE writ in this case was directed to the chamberlain of the county palatine of Chester, and served by the plaintiff's attorney on the defendant.

Cross, Serjt., obtained a rule nisi to set it aside, on the ground that the writ itself was improperly served; that on the receipt of the writ the chamberlain should have issued his mandate to the sheriff, and the mandate should have been served.

Jones, Serjt., who showed cause, contended that the Court would only set aside the service where there was likely to be confusion with regard to the filacer, *Williams v. Gregg*, 7 Taunt. 233, which was not the case here; or where the writ was improperly addressed to an officer on the spot. But

The COURT held that the plaintiff's attorney ought to have taken the intermediate step of procuring the chamberlain's mandate to the sheriff, and that without it the service was irregular.

Rule absolute.

*195] *HENLEY v. Mayor and Burgesses of LYME REGIS. July 8.

A member of a corporation may be bail in error in an action brought against the corporation.

WILDE, Serjt., opposed one of the bail in error in this case, on the ground that he was a member of the corporation of Lyme, and therefore in effect one of the defendants. But

The COURT disallowed the objection, and the bail passed.

Ex parte JEFFERIES. July 8.

The clerk of the treasury of the Court of Common Pleas is bound to a personal attendance on his duties, and therefore is not compellable to serve the office of overseer.

WILDE, Serjt., had obtained a rule *nisi* for a writ of privilege to exempt Mr. Jefferies, the clerk of the treasury of this court, from serving the office of overseer of the parish of St. Giles.

He alleged that the duties of the office of clerk of the treasury required his constant attendance, and that he had offered to serve the office of overseer by deputy.

Mercuether, Serjt., who showed cause, contended that the office of overseer could not be performed by deputy; that the office of clerk of the treasury might; and that it did not require the officer's personal attendance. In *March*, p. 30, in the case of a clerk of the court, it was said there was no privilege except as to the office of churchwarden. The question was, Whether personal attendance

*196] was requisite in both the offices which the *party was called on to fill?— and it lay with the party called on to show that he could not perform by deputy his office in court. In *Bishop v. Lloyd*, Bunb. 225, the writ was refused, because personal incompatibility was not shown. The same principle was acted on in *Farrand's case*, 2 W. Bl. 115, and *Rex v. Clarke*, 1 T. R. 679.

Wilde. The personal attendance of the officer in the duties of this court cannot be dispensed with, and the court will take judicial notice of the duties of its own officer.

In *The Mayor of Norwich v. Berry*, 4 Burr. 2109, an attorney of the Court of Common Pleas, who was also a member of the corporation of Norwich, was, on the ground of his supposed attendance in Court, held exempted from serving an office in the corporation. The privilege is attached to the court, not to the individual.

Cur. adv. vult.

The COURT this day, after reading several extracts from the report (published in 1816) of the commissioners appointed by parliament to inquire into the duties and emoluments of officers in the various courts of justice in Great Britain, which showed that the clerk of the treasury of the Court of Common Pleas was bound to attend personally in the discharge of his duties, made the rule for a writ of privilege absolute, on the ground that the duties of the office of overseer were incompatible with such personal attendance on the Court.

Rule absolute

*HAMMOND v. TEAGUE.

[*197]

The Court will not allow a party to plead in *assumpsit* matter which may be given in evidence under the general issue, unless the plea be simple, and not likely to perplex the plaintiff.

In *assumpsit* for money had and received, money lent, money paid, &c., *Russell*, Serjt., had obtained a rule *nisi* to plead several matters; viz. first, the general issue; and secondly, as follows:—

That before the said times in the said first, second, and third counts mentioned, to wit, on the day and year aforesaid, to wit, at London aforesaid, the said plaintiff and divers other persons had entered into and become and then were shareholders and partners together in a certain partnership or company, called the Cornwall and Devonshire Mining Company, and remained and continued such partners for a long space of time, to wit, from thence hitherto; that the said sums of money so alleged to have been lent and advanced, and paid, laid out, and expended by the said plaintiff, and for the use of the said defendant, and had and received by the said defendant to and for the use of the said plaintiff, were lent, and advanced, and paid, laid out, and expended by the said plaintiff, and had and received by the said defendant and the said other partners in the said company or partnership for and towards the purposes and concerns of the said company and partnership, and the said sums then and there became and were part of the stock and effects of the said company or partnership, and became and were common to all the partners and shareholders therein, to wit, at, &c.

Wilde and *Merewether*, Serjts., showed cause. All that can be given in evidence under the second plea, may also be *given in evidence under the general issue. The plea is a catching plea, very astute, and, as it does [*198] not narrow the question to be tried, but only tends to distract, and to give rise to a multifarious and double reply, the court will refuse its sanction. *Farr v. Hinckling*, 4 B. & C. 547; *Maggs v. Ames*, 4 Bingh. 470.

Russell. In *Moffat v. Van Millingen*, 2 B. & P. 124, the same plea was pleaded, (*Cur.* without the general issue.) And in *Mainwaring v. Newman*, 2 B. & P. 120, with the general issue. In *Holmes v. Higgins*, 1 B. & C. 74, Lord Tenterden held, that it might be pleaded; and it would save expense, by confining the question between the parties to a single issue, for a single replication might be taken on the whole.

TINDAL, C. J. By refusing the present application we do not abridge any portion of the defence, because all which it is proposed to plead may be given under the general issue. The defendant alleges, that he seeks to avoid expense by driving the plaintiff to a single issue; and though we incline to think that one issue might be taken on the whole matter which it is proposed to plead, the several allegations amounting to but one defence,—as in the case in *Burrow*, the levancy and couchancy of commonable cattle,—yet there is enough to perplex a plaintiff, and to raise a doubt whether he could reply to all or a part only of the matter pleaded; and as the whole may be given in evidence under the general issue, the application must be refused.

PARK, J., and BURROUGH, J., concurred.

*GASELEE, J. Under the statute of Ann. a party is permitted, with [*199] the leave of the Court, to plead as many several matters as are necessary for his defence. In *assumpsit*, the general issue, and matters which may be given in evidence under it, are not several matters; nevertheless, it has been the practice of the Court to permit a party to plead matters which might be given in evidence under the general issue, where such matters are simple and single. And such a course is beneficial, as it tends to prevent surprise. In the cases cited, the pleas were in short terms, partnership between the plaintiff and defendant; and if the plea now proposed had been such, perhaps we should have allowed it: but this plea contains five or six different matters, calculated to

perplex the plaintiff. The action is for money paid and money lent: the defendant pleads that the plaintiff and defendant and others were partners in a mining company; that the money was employed by them for the purposes of the company and became part of the effects of the company. That is no longer money lent or money received; and, independently of the multifariousness of the plea, which would put the plaintiff to difficulties, it is doubtful whether the plea is good. By refusing to allow it, we do not abridge any portion of the defence, and the rule must be
Discharged.

*200]

*MEMORANDA.

In the course of the last vacation Sir Nicholas Conyngham Tindal, Knight, was appointed Chief Justice of this Court in the room of Sir William Draper Best, created Baron Wynford; and took his seat on the first day of this term.

Edward Burtenshaw Sugden, Esquire, was appointed his Majesty's Solicitor-General in the room of Sir N. C. Tindal; and was knighted.

Sir Charles Wetherell, his Majesty's Attorney-General, resigned his office, and was succeeded by Sir James Scarlett, Knight.

In the course of this term William Henry Tinney, Thomas Pemberton, James Lewis Knight, Esquires, and the Honourable Charles Ewen Law, were respectively appointed his Majesty's Counsel learned in the law; and took their seats within the bar accordingly.

END OF TRINITY TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
 COURT OF COMMON PLEAS,
 AND
 OTHER COURTS,
 IN
 Michaelmas Term,

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

NEWBERRY v. ARMSTRONG. Nov. 7.

“I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of 50*l*.:” Held, that the consideration for the guarantee sufficiently appeared.

ASSUMPSIT on the following guarantee:—

“To Mr. John Newbury.

“Sir,—I, the undersigned, do hereby agree to bind myself to be security to you for J. Corcoran, late in the employ of J. Pearson of London Wall, for whatever you may intrust him with while in your employ, to the amount of 50*l*., in case of any default to make the same good.

“11th March, 1828.

“W. ARMSTRONG.”

A verdict having been given for the plaintiff at the trial before Tindal, C. J., Middlesex sittings after Trinity term, for 34*l*., which Corcoran had failed to account for to plaintiff,

**Taddy*, Serjt., moved to set it aside and enter a nonsuit, on the ground that no consideration for the defendant's undertaking appeared [202 on the face of the agreement.

If Corcoran were already in the plaintiff's employ at the time of the guarantee, there was an entire absence of consideration; and if he were taken in consequence of the guarantee, that could only appear by parol evidence, which it was the object of the statute of frauds to exclude in such a case. *Saunders v. Wakefield*, 4 B. & A. 595; *Jenkins v. Reynolds*, 3 Brod. & Bingh. 14; *Lees v. Whitcomb*, 5 Bingh. 34.

TINDAL, C. J. The statute of frauds requires that an agreement to answer for the default of another shall be in writing; and the word agreement has been held to include a consideration, for without one there is no valid agreement.

The question here is, whether a consideration appears on this agreement, or is to be collected from it by fair and necessary implication? In my opinion the consideration appears. The language is, "To be security to you for J. Corcoran, late in the employ of J. Pearson, for whatever you may intrust him with while in your employ." That is, if you will intrust one who has left the service of another. The words are all prospective. It may fairly be implied that Corcoran had left one service, and that the guarantee was given in consideration of his being taken into another. We ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life.

PARK, J. I should be sorry to depart from the decisions in *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, *where the principle established in *203] *Wain v. Warlters*, 5 East, 10, was unanimously adhered to. The question here is, whether the consideration sufficiently appears on this instrument? I think it does; because where the defendant undertakes in respect of one who has *lately* been in the employ of another, for whatever the plaintiff *may* intrust him with, the agreement is plainly prospective, and in consideration of the party's being employed and intrusted.

BURROUGH, J. Whatever is necessarily implied may be taken to be in the instrument. There is no ground for the objection.

GASELEE, J. It is clear that credit was to be given prospectively to Corcoran. That is a sufficient consideration. Rule refused.

HERBERT, Assignee of KNIGHT, v. WILCOX. Nov. 7.

A payment by an insolvent to a creditor, within three months before the insolvent's imprisonment, is void under 7 G. 4, c. 57, s. 32, although the word *pay* is not employed in that section.

By the 7 G. 4, c. 57, s. 32, it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, *charge, delivery, and making over, *204] shall be deemed and is hereby declared to be fraudulent and void, as against the provisional and other assignee or assignees of such prisoner appointed under this act: provided that no such conveyance, &c., shall be deemed fraudulent and void unless made within three months before the commencement of such imprisonment."

Knight being insolvent, borrowed money of A. B., and immediately paid it over, within three months before his imprisonment, in discharge of the debts of various of his, the insolvent's, creditors, and among others, the defendant.

The plaintiff, as Knight's assignee, then sued the defendant for money had and received, under the above section of the insolvent debtors' act.

A verdict having been given for the plaintiff at the trial before Tindal, C. J., last Bristol assizes,

Merewether, Serjt., moved to set it aside and enter a nonsuit, on the ground that the above section of the act was directed against fraudulent transfers of property by the insolvent, but not against *bona fide* payments; that the word *deliver*, taken as accompanied with the other expressions, did not include a delivery by *payment* of money; and that by analogy to the language of the

*207] ing to the said *premises twice over in good oil colours every third year of the said term ; and at the end of the said term, to leave the said premises in good and tenantable repair, reasonable use and wear thereof, and damage by fire in the mean time, only excepted. That the said T. W. Pinero shall have liberty to enter and view the said premises, and to give or leave notice in writing thereon to repair all defects and decays within three months then next following : and that the said Charles Judson and Samuel Cook, their executors, administrators, and assigns, shall do all necessary repair in and about the premises (except damage by fire as aforesaid). And, further, that the said Charles Judson and Samuel Cook, their executors, administrators, and assigns, shall not convert the said premises into a shop, or use the same for carrying on therein any trade or business whatsoever. And also a proviso for re-entry on non-payment of rent or breach of any of the said covenants. The said lease also to contain a covenant by and on the part of the said T. W. Pinero, his executors, administrators, and assigns, for quiet enjoyment upon payment of the said rent and performance of the said covenants. And the said Charles Judson and Samuel Cook agree to accept and take the said lease of the said premises aforesaid upon the terms aforesaid, and to execute a counterpart thereof immediately upon the execution of the said lease, and to pay the expense of preparing the said lease. *And in the mean time, and until such lease shall be made and executed, to pay unto the said Thomas W. Pinero, his executors, administrators, and assigns, the aforesaid yearly rent or sum of 80*l.* in manner aforesaid, and to hold the same premises, subject to the covenants above mentioned.* And the said Charles Judson and Samuel Cook further agree to put the said premises into good and tenantable *208] repair at their own expense, and to *complete all such repairs on or before the 25th day of April now next ensuing. And, lastly, it is hereby mutually agreed between the said parties to this agreement, in case the said Charles Judson and Samuel Cook shall not put the said premises in such repair aforesaid within the time aforesaid, or if at any time before the said lease shall be made and executed any quarterly payments of the said yearly rent of 80*l.* shall be in arrears, and no sufficient distress be found on the said premises, then, and in either of such cases, the said T. W. Pinero, his executors, administrators, and assigns, shall and lawfully may re-enter upon the said premises, and thereupon this agreement shall be absolutely void to all intents and purposes, except only as to the recovery of the said rent so in arrear, or any satisfaction for the amount thereof. In witness, &c.

No lease was ever executed.

The defendants proved a notice given by them in September 1827 of their intention to quit at Lady-day 1828, and that in fact they had quitted at the latter period. It was contended on their behalf, that the instrument relied on by the plaintiff was only an agreement for a lease, and not an actual demise, and that the defendants, as tenants from year to year, had determined their liability by quitting according to notice, at Lady-day 1828.

For the plaintiff it was insisted, that the instrument amounted to an actual demise, and that the defendants were liable under it till Midsummer 1828. Verdict for plaintiff: which

Jones, Serjt., now moved to set aside and enter a nonsuit instead, on the ground urged at the trial, and also on the ground that the defendants not having been in actual occupation for the quarter in dispute, the form of action was wrong.

*209] The Court must construe the instrument according to *the intention of the parties, to be collected from it; *Doe d. Coore v. Clare*, 2 T. R. 739, *Tempest v. Rawlings*, 13 East, 18; and where there is a stipulation for a lease in future, it is manifest the parties cannot contemplate any present demise. Such was the inference drawn from the stipulation for a lease in *Goodtitle v. Way*, 1 T. R. 735; and such was the inference always drawn, till the case of *Poole v. Bentley*, 12 East, 168, was decided. That case, however, turned on the stamp laws, and is distinguishable from the present in the circumstance,

that though there was a stipulation for a lease, there was also an actual demise *per verba de presenti*, which is wanting here. If such words could be supplied, the applications which are frequently made to courts of equity for a lease pursuant to an agreement, would be unnecessary.

In *Roe d. Jackson v. Ashburner*, 5 T. R. 163, it was established, that the Courts will consider these instruments as agreements for demises, and not as actual demises, where such can be collected to have been the intention of the parties; and in *Morgan v. Bissel*, 2 Taunt. 65, and *Dunk v. Hunter*, 5 B. & A. 322, the circumstance that a future lease was stipulated for was deemed conclusive against the implication of any present demise.

But at all events, as the defendants did not actually occupy, they should have been proceeded against in some other form of action. *Assumpsit* for use and occupation only lies where the party has actually occupied. And therefore, a husband has been held not liable in this form of action in respect of premises occupied by his wife *dum sola*. *Richardson v. Hall*, 1 Brod. & Bingh. 50. In *Naish v. Tatlock*, 1 H. Bl. 323, Eyre, C. J., says, "The statute meant to *provide an easy remedy in the simple case of actual occupation, leaving [*210 other more complicated cases to their ordinary remedy."

TINDAL, C. J. This is an action in which the plaintiff seeks to recover for the use and occupation of his premises for one quarter of a year ending at Midsummer 1828; and the question is, whether the defendants' tenancy subsisted during that period. If the instrument on which the plaintiff relies be a lease, it did: if that instrument be an agreement without any actual demise, it did not, a notice having been given by the defendant to determine the holding at Lady-day 1828. Is this instrument, then, to be interpreted as a lease or an agreement for a lease? The law is well settled, that where there is any doubt as to the operation of the contract, the Court must endeavour to discover the intention of the parties from the contents of the instrument; and if we see a paramount intention that the instrument shall operate as a lease, we must hold it to be such, although it may contain conflicting expressions. We think this instrument must be taken to operate as a lease. It is true, the parties contemplate a formal lease in future, and if that were the only stipulation there might be some difficulty, although it is to be observed, that the term is to begin at once. But when we come to the latter words of the agreement, that until the lease is executed the parties are to stand in the same relation as if it had been executed, there is no longer any room for doubt. The defendants are to hold according to covenants, some of which are inconsistent with a tenancy from year to year: as that, to paint once in three years; and that, for the tenant's putting the premises in repair before he commences his occupation. These covenants would be unreasonable for a tenant from year to year, but reasonable and usual for a tenant who takes a term.

*It was no doubt meant that there should be a formal lease, but that the tenant should hold in the mean time under a demise, upon the same [*211 terms as if that lease had been executed; and it is for his interest that the instrument should receive such a construction, because it is attended with greater certainty.

The disposing of the first objection puts an end to the second; for, according to the statute, if he holds or occupies, he may be sued in an action for use and occupation, and we find that he holds.

PARK, J. We must look to the instrument to see what was the intention of the parties. Considering that the plaintiff is an attorney, who, professionally, would wish to draw deeds, the object of the stipulation seems to have been to secure him a little employment in that way; for, till the deed was executed, the parties were to hold in the same way as under the deed. That part of the agreement removes any doubt, "And until such lease shall be made and executed, to pay to the said T. W. Pinero, his executors, administrators, and assigns, the aforesaid yearly rent, and to hold the same premises subject to the covenants above mentioned." The defendants adopt all of them, and they are inconsistent with

a holding from year to year, especially those for repairing before entering on possession, and for painting every three years. Our decision will be conformable with what was laid down by Lord Ellenborough in *Poole v. Bentley*, "that the intention of the parties, as declared by the words of the instrument, must govern the construction." And he there was led, from the covenant to lay out money, to draw an inference like that which we have drawn in the present case from the covenant to paint. The tenant was to do that in the first four years, which was inconsistent with a tenancy from year to year. There is nothing in the second point.

*212] *BURROUGH, J.* We should overturn *Poole v. Bentley*, which is good law, if we were to hold this not to be a demise. The other point is quite clear. This is such a holding as entitles the plaintiff to sue in an action for use and occupation. Actual occupation is not necessary; legal possession is sufficient; and the plaintiff had possession enough to sue in trespass.

GASELEE, J. It is time that questions of this sort should be set at rest. The decisions are conflicting, but *Poole v. Bentley* rests on a sound principle. There is a material distinction between *Roe v. Ashburner* and *Poole v. Bentley*. *Ashburner, J.*, says, in the former case, "I entirely agree to the position, that whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties, which must be collected from the words of the agreement, and from collateral circumstances. Where the words are *de presentii*, 'I demise,' &c., or an agreement, that 'the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter, is strong evidence to show that the landlord intended to give a present interest. But where the words themselves do not necessarily imply it, and where possession is not given, and there is no other act to manifest such intention, then it is merely an executory contract. Now, here the words themselves import an executory agreement; for the words 'shall enjoy' are followed by 'I engage to give him a lease,' and 'I will purchase land, &c., to be added to the rest,' &c. And the smallness of the quantity of land to be purchased and added to the rest cannot vary the case; because the whole depends, not on what was granted at the time but on what was to be *213] granted afterwards. Besides, the *rent is agreed upon at all events, and if this were construed to be a lease, the landlord would have a right to distrain for the whole rent, although the addition were not afterwards made by the purchase, and the only remedy left to the tenant would be by an action at law or a bill in equity." In *Poole v. Bentley*, there was nothing to be added on the part of the lessor subsequently to the agreement, as in *Roe v. Ashburner*. I think a court of equity would not, as the counsel for the defendant has contended, although there be an actual demise, not under seal, refuse to order a more formal conveyance. But the rule in *Poole v. Bentley*, and *Barry v. Nugent*, 5 T. R. 165, n., ought to be followed here. As to the second point, parties have been repeatedly held liable in actions for use and occupation, although there has not been an actual occupation for the whole of the time in respect of which the actions have been brought. Rule refused.

SAUNDERS v. MILLS. Nov. 10.

1. A statement in a newspaper of the circumstances of a cause tried in a court of justice, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence, is not such a report of the proceedings of a court of justice, as a newspaper is privileged to publish.
2. In mitigation of damages, the defendant was allowed under the general issue to show that he copied this statement from another newspaper, but was not allowed to show that it had appeared concurrently in several other newspapers.

LIBEL. At the trial before Tindal, C. J., Middlesex sittings after Trinity term, the defendant, the editor of a newspaper, admitted the publication of the matter complained of, which was as follows:—"Extraordinary charge of poaching. At the Gloucester assizes an action was brought by Lord De Clifford against Mr. Saunders, *an attorney of Bristol, and two other persons, [214 under these extraordinary circumstances, as stated by the counsel for the prosecution. The defendant had taken a cottage on the border of Lord De Clifford's preserves, where he kept a regular poaching establishment. Fair sporting was out of the question, for it appeared that the defendant used to turn out his dogs in the night, when they did much mischief on the neighbouring estate. In consequence of this, Lord De Clifford gave orders, that all dogs caught on his manors should be brought into the kennel, and there kept till they were claimed. It happened that a greyhound of the defendant's was found in one of Lord De Clifford's fields, and was taken to the kennel to wait its being claimed by the owner, as it was not certainly known to be a dog of the defendant's. Instead of writing to Lord De Clifford to have the dog delivered up, the defendant went with two other persons, on the 22d of October, and having broken open the door of Lord De Clifford's dog-kennel, he rescued the dog. These parties came the next day to dig up the body of a dead dog. Mr. Saunders had a horse-pistol, and then insulted Lord De Clifford's servant; and Mr. Saunders challenged one of the keepers to fight. The actual injury to the kennel door was not much, but damages were sought to be recovered, which would teach the defendant to behave more correctly for the future. The defence was, that the defendant had done no more than was necessary for the recovery of his dog, and that another dog of his having been shot by one of Lord De Clifford's keepers, and buried, they merely went on the second day to dig up the body of that dog and bring it away. Mr. Justice Park said, that the amount of damages was not necessarily limited to the actual damage done to the door of the dog-kennel; but still he thought the jury should give just such damages as would not be very injurious *to the defendant's pocket, but yet such as [215 might have the effect of making him mend his ways, and behave with more propriety in future. Verdict for the plaintiff, damages 50*l*. Mr. Justice Park.—I shall certify for the special jury. If the defendant dismisses his game-keepers, he will soon pay up the damages."

He then proved that it was copied in substance from the Observer newspaper, and proposed to give evidence that many other journals had published the same statement. This evidence the learned Chief Justice rejected.

The plaintiff in reply, put in a letter written by the defendant to the plaintiff, in answer to an application from the latter for an explanation of the first statement, which contained an explanation, but in language which (as it was contended on the part of the plaintiff) conveyed a sneer also.

The jury gave a verdict for the plaintiff, with 50*l*. damages.

Ludlow, Serjt., moved for a new trial, on these grounds, 1st. The publication appearing on the face of it to be a report of a trial in a court of justice, was *prima facie* a privileged publication, and the plaintiff ought to have given some evidence of malice, instead of relying on the naked fact of publication. *Curry v. Walter*, 1 B. & P. 53, has established the lawfulness of such reports; and in *R. v. Wright*, 8 T. R. 293, Lawrence, J., said, "It has been said that the publication of the proceedings of courts of justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield v. The Bishop of Chichester*, has been cited; but on examining that case, it appears that the charge there was, that the plaintiff had not published a true account: therefore I *do not think that case establishes the proposition, to sup- [216 port which it was cited; and I am not aware of any authority that does support it. The proceedings of courts of justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings

contain no point of law, and are not published under the authority or sanction of the Court, but they are printed for the information of the public."

The courts of justice are open to all who are able to attend, and it can scarcely be unlawful for a man to read that which it would be lawful for him to hear. Reports of what passes in those Courts, afford the most instructive moral lessons to the people, and it would be inexpedient in any way to impede the circulation of them.

The result of all the decisions, as it may be collected from *Bromage v. Prosser*, 4 B. & C. 247, is, that where matter published is on the face of it libellous without excuse, the defendant must either show its truth, or otherwise make out his own justification; but where it appears to be a privileged communication, or a publication of what has passed in a court of justice, the plaintiff must show its untruth, and the motive of the publisher.

The defendant here has cautiously qualified his statement, and divested it of its sting, by giving it only as the speech of counsel.

2dly. Evidence ought to have been admitted that the same statement was made in other journals, not by way of justification, but in mitigation of damages. In *Lord Leicester v. Walter*, 2 Campb. 251, the defendant was allowed to prove *217] under the general issue, in mitigation of *damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that on account of this suspicion, his character had not been lowered by the libel. So, in ——— v. Moor, 1 M. & S. 284, in an action of slander, for imputing to plaintiff a specific charge of unnatural practices, the declaration containing the usual allegations of good fame, &c., the defendant was allowed upon cross-examination to ask the plaintiff's witness whether he had not heard in the neighbourhood reports that the plaintiff had been guilty of such practices. In *Wyatt v. Gore*, 1 Holt, N. P. C. 299, it was holden, that in an action on a libel, to which the general issue was pleaded, and there was no justification, the defendant might give in evidence, in mitigation of damages, not only that there were rumors and reports (of the same tenour the libel) as previously current, but that the substance of the libellous matters had been published in a newspaper.

3dly. The damages were, at all events, excessive, the defendant having guarded his narrative, by giving it as the statement of counsel, and having reprinted it from another journal as part of the current news of the day.

TINDAL, C. J. I am of opinion that the rule for a new trial ought not to be granted. The learned Serjeant has put his motion on three distinct grounds. The first is, that the plaintiff did not go far enough in his evidence, and ought to have proved that the publication was an incorrect report of what had occurred, or that the defendant had been influenced by express malice in making the publication; secondly, that evidence in mitigation of damages was improperly *218] rejected; and, thirdly, that the damages were excessive. With respect *to the first, that which I am about to say will not interfere with the generally received doctrine, that newspapers and other publications which narrate what passes in courts of justice are, to a certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible, that, on several occasions, they do, to a great extent, serve the cause of public justice. They ought, therefore, to be privileged; but their privilege must be restrained to occasions in which they publish fairly what passes in the court. Now it is impossible to read the report in this cause without seeing that the publication is *ex parte*, and is not a fair and candid publication of what took place in the court at Gloucester. The report itself begins by professing to give an account of the action, as arising under "these circumstances, as stated by the counsel for the prosecution." It therefore does not even profess to be an account taken from the evidence given at the trial, nor even to be an account taken from counsel's statement but afterwards corrected by the evidence given in the cause. Every body knows that the statement of a counsel is *ex parte*, and that he is often instructed to make allegations which it is

afterwards impossible to support in proof. Would it be either safe or proper, that after a cause has been tried, a statement, which the evidence has not at all supported, should be published in a newspaper; and then merely because that statement had been made by a counsel, it should be held to be privileged? Ought such a publication to be considered a fair report of what had passed in court, although the evidence afterwards given might not only not support, but might even to some extent contradict it? Ought such a publication to be privileged? I conceive not; and I think that such will not be held to be the law of the land. On the face of this report, it is not a fair account of the trial. It begins by saying that it *is a report of the statement of counsel, and it then goes on to say, that the defendant took a cottage in the neighbour- [*219 hood of Lord De Clifford's preserves, where he kept up a regular poaching establishment. No man can believe that this is the language of any witness—it can only be the language of counsel in aggravation of the case he is called on to support on the part of his client. The account says fair sporting was out of the question, for the defendant was in the habit of turning out his dogs at night, when, as it appeared, they did much mischief to the neighbouring estates. In that part of the report it evidently changes its character, and goes into the evidence, for it was only in the evidence that this circumstance could have "appeared." The defendant has, besides, mixed up with the general allegations of the counsel for the then plaintiff, a statement of the consequences; for he goes on to say, that in consequence of these things, Lord De Clifford ordered all the dogs found on his manor to be taken to his kennel and kept there till claimed. So far this report is of a statement made on the part of the plaintiff at that trial. We come now to the report of the defence: and it would be thought, that if this pretended to be a fair report, the defence would be set out with at least the same degree of exactness and accuracy. This certainly would have been done in a fair account of the transaction. Instead of this, there is only a dry observation or two of counsel, and then comes the charge of the learned Judge; and in giving that, the defendant has singled out more particularly that which bears unfavourably on the conduct of the present plaintiff. I ask again, whether any one can say that this is a fair account of the proceedings? and that question I put to the jury, when I left it to them to say whether, on the face of this account, it was or was not fairly given? Without at all breaking in *upon the supposed principle or right possessed by the [*220 editors of newspapers of communicating to the public the proceedings in courts of justice, I did not think, nor did the jury believe, that the account in this case was fairly given, or even imported to be so. This disposes of the first ground of the motion. The second is as to the rejection of the evidence of publication in other newspapers. It appeared to me, that as there was no justification or excuse upon the record, I had gone to the full length in allowing *The Observer*, from which the libel had been copied, to be put in evidence. That evidence might weigh with the jury, as showing there was less of malice than if the defendant had been the original composer of this libel, and so far he had the benefit of it; but I think I was justified in declining to receive evidence of a similar publication having been made in other newspapers. As to the question of damages, that is one which at all times it is the peculiar province of a jury to determine; and it is only when the damages are excessive and exorbitant to all common understandings that the courts feel themselves called on to interfere. Evidence was given of the apology which the defendant offered to insert; and, probably, the jury might think that the nature of the apology was such as to add a degree of bitterness to the original libel. I see no reason, under all these circumstances, to object to the amount of the damages.

PARK, J. I am of the same opinion. It has been admitted that the statement complained of imports a libel on the plaintiff. It charges him with having kept a poaching establishment, in which fair sporting was out of the question, for that he used to turn out his dogs in the night, when they did much mischief in the neighbouring estates. But it has been contended that this was a report

*221] of what passed in a court of *justice, and that such a report cannot be treated as a libel. All the cases, however, decide, that in order to exempt the publisher of such a report from the consequences attached to publishing a libel, it must be a fair report of what passed. In *Stile v. Nokes*, 7 East, 492, where the defendant published a highly-coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in Court, which contained an insinuation that the plaintiff had committed perjury, Lord Ellenborough held that such a publication could not be justified; and said, "The account of the proceedings in Court is so interwoven with the comments, that we cannot with certainty separate them throughout, although we can see plainly enough that certain parts are an overcharged account of the judicial proceedings. The Court cannot decompose this mass: but the party who requires the separation to be made for his own defence, ought to have taken upon himself the burden of doing it, in order that the Court might see with certainty what parts he meant to justify. I should have great difficulty in saying what parts purport to contain an account of the trial, and what parts are libellous. If they cannot be separated by the industry of the pleader, how can they be so by general reference? If they can be so separated, they ought to have been." In the present case, it is very likely that the counsel said all that has been repeated by the present defendant, and even that I might have adopted some of his expressions with regard to the conduct of the plaintiff; but not one of the witnesses said that he kept a poaching establishment, nor was there any proof that such was the case. But I cannot accede to the position, that a party is excused for publishing every proceeding in a court of justice, even though he

*222] publish *it fairly and with truth. In *R. v. Creevy*, 1 M. & S. 273, a member of parliament who published in a newspaper the report of a speech delivered by him in the House of Commons, was held responsible for libellous matter contained in it, although the publication was a correct report of the speech, and was made in consequence of an incorrect publication having appeared in that and other papers. In *R. v. Mary Carlile*, 3 B. & A. 167, the report of a trial which the defendant had published was true, but Abbott, C. J., said, "There can be no doubt in the mind of the Court, or of any person acquainted with the law of the country, that if, in the course of a trial, it becomes necessary, for the purposes of justice, that matters of a defamatory nature should be publicly read, it does not, therefore, follow, that it is competent to any person, under the pretence of publishing that trial, to re-utter that defamatory matter." And Bayley, J., said, "We are bound, for the purposes of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. The first time I had occasion to consider the subject, was in the case of some trials for adultery. It very often happens, that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound, in a court of justice, to hear it, other persons are not at liberty, afterwards, to circulate it, at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce."

The present, however, is manifestly not a fair report of what passed at the trial in question.

*223] I think, also, that there is no ground for granting a *rule on account of the evidence which the learned Chief Justice rejected. Whether evidence as to the plaintiff's general character ought to be admitted in an action for a libel, on the general issue, in mitigation of damages, has long been *veraxata questio*. In *Jones v. Stevens*, 11 Price, 235, there is a luminous exposition of the whole law on the subject by Wood, B., and he strongly protests against the admission of such evidence. But what was rejected in the present cause was properly rejected, since, if admitted, it could not have operated as any extenuation of the defendant's conduct.

BURROUGH, J. This was a libel on the face of it, although professing to be

a report of what passed in a court of justice, for the defendant does not profess to state facts as deposed to by witnesses, but the mere opinion of the counsel who opened the cause.

As to the rejection of evidence of publications by others to the same effect, I have no idea that such a fact would have any weight at all. It is of no avail for the defendant to say that others have done wrong as well as himself. The evidence was properly rejected.

GASELEE, J. The only point on which I have entertained any doubt, is, Whether evidence ought to have been admitted that reports to the same effect were contained in other publications: but, beyond the report which *was* admitted, the defendant was not shown to have acted on any knowledge of such publications, and, therefore, I do not entertain sufficient doubt to desire any alteration in the judgment which has been pronounced by my Lord Chief Justice. Whether a defendant, in a libel cause, may be permitted under the general issue to give evidence of matters of excuse, in *mitigation of damages, or is bound to plead such matters, seems still to be *vexata questio*; but the defendant here [*224] has neither pleaded, nor offered to prove anything that could operate as an excuse. In *Waithman v. Weaver and Others*, 11 Price, 257, in note,—which was an action brought by the plaintiff against the defendants, who were the proprietors and printers of the *John Bull* newspaper, for a libel attributing to the plaintiff, amongst other things, the fact of having bought from a man of suspicious character two shawls, for a small sum of money, which he had himself sold to another person at a much higher price on the preceding day,—when the plaintiff's case was closed, and the defendant's counsel had addressed the jury, they proposed to call witnesses to prove that the libel in this respect was no more than a repetition of rumours which were prevalent at the time of the facts imputed to the plaintiff therein, in order to diminish the damages, in case the jury should find a verdict for the plaintiff on the general issue, by removing the impression of malicious invention in the account complained of, and quoted several authorities to show that they were entitled to give such evidence; but Abbott, C. J., objected to admit evidence of the existence of such injurious reports, said to be in circulation to the prejudice of the plaintiff.

Rule refused.

*HAYLLAR v. ELLIS. Nov. 11.

[*225]

Where a plaintiff makes several claims against a defendant, and the defendant makes others against the plaintiff, if an arbitrator, to whom the cause is referred, finds that the plaintiff had no cause of action, his award is, in that respect at least, sufficiently certain

In this cause an arbitrator had to decide on certain specific claims which the plaintiff made against the defendant, and the defendant against the plaintiff. He made an award in favour of the defendant, and found generally that the plaintiff "had no cause of action."

Taddy, Serjt., moved to set aside the award, as not sufficiently certain. He contended it could not be pleaded in bar if the plaintiff were again to sue the defendant on any of the distinct causes of action submitted to the consideration of the arbitrator, as it would not with certainty appear which of them had been decided on. But

The Court held it sufficient, and

Taddy took nothing.

Tindal, C. J., was absent at Chambers.

*226]

*MADDISON v. NUTTALL. Nov. 11.

An ancient statement concerning the payment of the tithes of a parish by a *modus*, signed by the rector for the time being, is evidence against a succeeding rector, as an admission by his predecessor, although found among the title-deeds of a land-owner in the parish, and not in the bishop's registry.

DEBT for tithes of hay, in the parish of West Monckton, Somerset. The defendant pleaded an ancient *modus*, or customary payment, whereof the memory of man runneth not to the contrary, of 2*d.* for every acre of meadow land lying in the higher side of the parish, where it was averred the defendant's land lay; and that it was meadow land. The plaintiff traversed the existence of the *modus*.

At the trial before Tindal, C. J., Bridgwater Summer assizes 1829, the defendant offered in evidence, among other matters in support of the *modus*, the following document, which was found among the title-deeds of an extensive landowner in the parish:—

"A note of all such tenthes and tithes as have been usuallie and accustomedlye paid within the parishe of West Monckton, and countie aforesaid, and manner of the payment thereof tyme out of minde, and noe other, nor otherwise than as followeth; *videlicet*,

Imprimis, at Ester, before takinge of the communion, the communicants ought to come to the church, and there with the parson are to make their Ester booke, and are to shew him what groundes they lett or sett.

Item, for a garden vsed to be paid 1*d.*

Item, for each communicant paid 1*d.*

Item, in the higher side of the saied parishe payde for every tithable acre of meadow 1*d.*"

(There was a great variety of other items, some of which were alleged by the plaintiff's counsel to be rank *moduses*, and the document concluded as follows:—)

*227] "*Item*, the parson is to keepe a bull and a bore for *the parishe, or muste allowe them what they paye to other men for his defaulte in either kind in y^e behalfe.

"The abouesayde tenth's tythes and no other, and manner of paymente as abouesayde and not otherwise, have bene eu^r usuallie payde, as it appears by a certayne role bearing date the 22 daye of August, in the yere of our Lord God 1619, kept in the parish chest, subscribed vnto by fower seuerall man who were procters and gatherers of the tithes and tenthes as abouesaid at seuerall tymes for certayne yeres together, besides diusse other of the most able and sufficient men of the same parishe.

"*Ita est* W. KINGELAKE.

(PHILIPUS FFRY RECT.)

"PHILIP MATHEW, als. procter,

"The marke of ✕ JOHN PRINCE,
WILLIAM RAYER.

"HUMF. QUICKE,

"EDM. JANE,

"THOMAS STEVENS.

"HENRY H. CROSSE,

"JOHN HAVE,

"THOMAS T. L. UPHAM."

A terrier, signed by Philip Fry, but relating chiefly to the parsonage house and glebe, having been put in from the bishop's registry, in which terrier there was no mention of this *modus* for hay; it was objected that the document offered by the defendant, purported to be a terrier, and ought not to be received, because it did not come from the proper custody;—the bishop's registry, or the parish-chest. But Philip Fry having been proved to have been rector of the parish from 1587 to 1642, and his handwriting having been also proved by a comparison with entries made by him in the parish books, and with his signature to
*228] documents in the *bishop's registry, the Chief Justice received the

above document in evidence, not as a terrier, but as an admission made by the rector for the time being.

It appeared that the boundary between the higher and lower division of the parish was not very accurately known; had occasionally been varied by the removal of fences and otherwise; and that the field from which the plaintiff claimed tithes in the present action, had once been ploughed, but was soon laid down to grass again. It was clearly, however, within the higher division, as alleged in the plea.

A verdict having been given for the defendant,

Merewether, Serjt., moved for a new trial, on the ground that the document found in the custody of the landowner ought not to have been received in evidence, even as the admission of a preceding rector, when there was a regular document of the same kind, the terrier from the bishop's registry, containing no mention of the modus; *Atkins v. Hatton*, 3 Gwill. 1406, 2 Anst. 386; that the document itself was not entitled to any credit, alleging as it did uncertain and rank mouses; and that no modus for a division of the parish could be certain, unless that division were accurately ascertained. He objected also, that a modus, being pleaded from time immemorial, could apply only to ancient meadow; that no evidence had been offered to show that the land, the tithes of which were in question, was ancient meadow, and at all events, that it ceased to be such when it had been once ploughed. (a)

TINDAL, C. J. The document objected to was evidence for the jury, *valcat quantum*. It was a very *ancient document, signed by the rector, and headed "Notification of the tithes of the parish." Though it did not [229] come out of the proper repository for a terrier, it must have been evidence against the rector who signed it, during his incumbency; and if so, it is not easy to see why it should not be evidence against a successor as the admission of one of his predecessors. It was not of so much weight as a regular terrier, but still was *some* evidence to go to the jury. With respect to the boundary of the divisions of the parish, the jury had to consider a great mass of discordant evidence, but it was admitted that the field in question was within the division subject to the modus, and if an occasional alteration of fences were sufficient to destroy a modus, the end might frequently be attained by trick and management.

The circumstance that the field had once been ploughed, would not alter the right when it became meadow again. There is no ground for granting the rule which has been prayed.

PARK, J. The whole of the objection to the evidence which has been received, rests on the assumption, that the document in question was not a terrier. But it was not received as such. A terrier ought to come from the bishop's registry, and then it is unnecessary to prove the rector's handwriting. In the present case his handwriting was proved, and the instrument was received only as the statement of an interested person against himself. Suppose he had given a receipt for the modus: would not that have been evidence against a successor? The instrument in question was properly admitted upon the same principle as such a receipt.

BURROUGH, J. The document was clearly evidence as an admission by a preceding rector, and the *circumstance of a terrier from the bishop's registry being also produced could not be a ground for rejecting it. It [230] was offered with a different intent, and stood on a footing different from the terrier. The boundary was altogether a question for the jury, and though modus for meadow land is no longer payable if it be converted into arable, yet if it be restored to meadow again, the modus still attaches.

GASELEE, J., concurring, the rule was

Refused.

(a) But see *Bishop v. Chichester*, Gwill. 1323, that a *parochial* modus may extend to lands enclosed within time of memory; *aliter* as to a *farm* modus.

IN THE EXCHEQUER CHAMBER.

EDWARDS v. BENNETT. Nov. 13.

(In Error.)

1. An assistant overseer, appointed under the 59 G. 3, c. 12, and having, by virtue of his office, the poor rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 G. 2, c. 3.
2. The declaration alleged that defendant was assistant overseer; that a rate for the relief of the poor was made and duly allowed; and although defendant, as such assistant overseer, had the rate in his possession, and although plaintiff, at a reasonable time, demanded an inspection of it, and tendered 1*s.*, yet defendant refused to produce it, whereby he forfeited 20*l.*:

Held, on motion in arrest of judgment, that the count was sufficient; for if the defendant had the rate in his custody as assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded.

THE declaration alleged, that plaintiff, before and at the time of the committing of the offence thereafter mentioned, was an inhabitant of the parish *231] of Almondsbury, in the county of Gloucester: that before *and at the time, &c., the defendant was the assistant overseer of that parish: and that, theretofore, to wit, on, &c., at, &c., the churchwardens and overseers made a certain rate for the relief of the poor of the said parish, and which rate was afterwards and before, &c., allowed by, &c., and published by the churchwardens and overseers of the poor of, &c.; and that afterwards, and at a reasonable time, to wit, &c., plaintiff requested defendant, as such assistant overseer, to permit him, plaintiff, to inspect the said rate, and then and there tendered to him 1*s.* for the same. And although the defendant then and there (as such assistant overseer) had the said rate in his possession, yet he would not permit the plaintiff to inspect it, whereby defendant forfeited for such offence 20*l.*, &c.

In Michaelmas term, 1828, the Court of King's Bench discharged a rule for arresting the judgment, on the ground that it was not averred in the declaration that it was the duty of the defendant, as assistant overseer, to exhibit the rate to the plaintiff when requested. And upon a writ of error to this Court,

Ludlow, Serjt., argued for the defendant below. The declaration does not bring the defendant below within either the words or the meaning of the 17 G. 2, c. 3. The words are, "That the churchwardens and overseers of the poor, or other persons authorized to take care of the poor in every parish, &c., shall permit all and every the inhabitants of the parish, &c., to inspect every such rate at all reasonable times, &c." The words, "other persons authorized to take care of the poor," were probably introduced to include persons mentioned in the 9 G. 1, c. 7, which authorizes the farming out of the poor, and cannot apply to the present plaintiff. Under the 59 G. 3, c. 12, assistant overseers are appointed; but *232] they are not like deputy overseers, they are not the *representatives of the overseers in all their duties, but only in those for the discharge whereof they are specially appointed. The declaration should, therefore, have averred distinctly that it was the duty of the defendant below, as assistant overseer, to produce the rate. The right of action is not founded on the mere possession of the rate by the defendant below; he may have been intrusted with it for certain specific purposes, excluding the duty of exhibiting it. The allegation that the defendant below had the rate, without the allegation that it was his duty to produce it, is, therefore, insufficient: *Max v. Roberts*, 12 East, 89; *Rex v. Everett*, 8 B. & C. 114; *Sutton v. Johnstone*, 1 T. R. 493. It makes no difference that this motion comes after verdict, for the plaintiff below was only bound to prove the facts alleged in the declaration, and it cannot be presumed that any others were proved; *Spires v. Parker*, 1 T. R. 141; and therefore, unless these facts disclose a good cause of action, judgment must be arrested.

Campbell for the plaintiff below. The argument on the other side would go to repeal the 17 G. 2. For the rate may be properly in the possession of the

assistant overseer, and if he be unpunishable for refusing to produce it, and the overseer may excuse himself on the ground that the rate is properly in the possession of the assistant, the parishioner is without remedy. But an assistant overseer, appointed with all the powers of an overseer, is an overseer within the intent of 17 G. 2. He is a species under the genus overseer; and, after verdict at least, the allegation in this declaration is sufficient. It is alleged that he was assistant overseer, and, *as such*, had the rate in his possession. If facts are alleged from which the duty necessarily arises, *the Court will take [*233 judicial notice of the duty; and it could not have been proved at the trial that he had the rate *as* assistant overseer, without showing an appointment pursuant to 59 G. 3, on which the duty would necessarily appear.

TINDAL, C. J. Two objections have been made to the record in this case. First, That an assistant overseer is not within the act 17 G. 2, c. 31, so as to be subject to the penalties imposed on overseers for non-observance of their duty to produce the parish rate when properly required; and,

Secondly, That there is no sufficient allegation of its being the duty of the defendant to produce his rate.

We are of opinion that neither of the objections is tenable, and that the judgment must be affirmed.

As to the first, by the 17 G. 2, c. 31, s. 13, it is enacted, "That if any churchwarden or overseer of the poor, or other person authorized as aforesaid,^(a) shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt, bill, plaint, or information, in any of his majesty's courts of record." And it has been urged, that an assistant overseer does not fall within any of these descriptions. It may be said, indeed, that he is not an overseer or churchwarden; but whether he be a person authorized to have the care of the poor, must depend on the nature of his appointment. By the 59 G. 3, c. 12, s. 7, it is enacted, "That it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers *of the poor of such parish, and [*234 to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office, as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seal, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes and with such salary, as shall have been fixed by the inhabitants in vestry."

If by this enactment he is a person authorized to have the care of the poor, he comes within the operation of 17 G. 2. And it would be a narrow construction of that statute, to confine its operation to offices known at the time of its enactment, when it contains general words, comprehensive enough to embrace an office created afterwards for the same purposes.

But it has been argued, that even if he be within the operation of the former statute, it does not sufficiently appear in this record. Had the objection been made on demurrer, it must have prevailed; but there is enough to enable us to intend, after verdict, that he was found to be a person liable to the penalties of the act. The declaration alleges that he was assistant overseer. That allegation could not have made out in proof, without putting in the warrant by which he was appointed; which having been before the judge, and subject to the observations he would make upon it to the jury, we may assume from the verdict that the duties prescribed were such as brought him within the operation of the statute. The declaration then goes on to state, that the rate-

(a) "To take care of the poor," s. 1

book being in his possession as assistant overseer, he was required to produce it; and after verdict we cannot intend that his possession was not legal. In either *235] view of the case, therefore, whether he was a person *authorized to have the care of the poor, or legally had the custody of the rate-book, there was sufficient to bring him within the operation of the statute; and we cannot be called on to intend, after verdict, that he is not to discharge duties, without proof of which the verdict could not have passed. *Rex v. Everett* is altogether distinguishable. There, an information stated that certain goods were about to be imported into Great Britain from parts beyond the seas, in respect of which certain duties would be payable; that one R. H. at the time of committing the offence thereafter mentioned, was a person employed in the service of the customs, and that it was the duty of him, as such person so employed in the service of the customs, to arrest and detain all such goods as should be imported, which upon such importation would become forfeited to the king by virtue of any act of parliament relating to the customs, and which would be liable to be seized; and that the defendant, well knowing, &c., unlawfully and corruptly solicited R. H. being such person so employed in the service of the customs, when certain goods should be imported, which upon importation would be liable to be seized or forfeited, to forbear to arrest and detain the same, &c. It was held, that inasmuch as it was not the duty of every person employed in the service of the customs to arrest and detain goods which would be liable to be seized as forfeited, the count was bad for want of showing that R. H. was a person whose duty it was to arrest and detain such goods.

But here the count alleges, that the defendant had the possession of the rate as assistant overseer; an allegation which could not have been proved without showing the appointment, in which the defendant's duty would sufficiently appear. Judgment affirmed.

*236]

*HOULDEN v. FASSON. Nov. 14.

Where an affidavit is sworn by two deponents, the names of both must be specified in the jurat.

MERKWEATHER, Serjt., in showing cause against a rule obtained by *Wilde*, Serjt., objected that the affidavit, on which the rule had been obtained, was defective in the *jurat*. The affidavit had been sworn by two persons, and the *jurat* stated it to have been sworn by "both the deponents," without specifying their names severally. By a rule of the King's Bench, both names are to be named in the *jurat*, and the affidavit is to be excluded if the *jurat* contain any interlineation or erasure.

The secondary stated, that the practice in this court was the same.

Wilde contended there was no rule on the subject in this court, and that the first branch of the rule in the King's Bench was only directory.

Upon the report of the officer, however, the Court discharged the rule, but without costs. They added, that the practice as to the *jurat* ought to be observed strictly; and that, in future, they would discharge with costs a rule under similar circumstances.

ADDIS v. THOMAS. Nov. 14.

A new rule to plead must be given after amendment of the declaration, although the amendment be on payment of costs.

On the 28th of July the plaintiff, after a rule to plead and time allowed for pleading, obtained leave to amend his declaration upon payment of costs; and

afterwards signed judgment for want of a plea, without giving a new rule to plead.

**Russell*, Serjt., obtained a rule *nisi* to set aside the judgment for irregularity, on the ground that the defendant ought to have had a new rule to plead. [*237]

Wilde, Serjt., *contra*, contended, that where the plaintiff paid costs upon amending, the defendant was entitled to no imparlance, and therefore it was not necessary to give a new rule to plead. Crompt. 130.

But the Court, on the report of the secondary, held that a new rule to plead must be given, whether the amendment were on payment of costs or not. (a)

Rule absolute.

(a) See Tidd, 475, and the authorities there cited.

PHILLIPS v. TANNER. Nov. 16.

Where the defendant died before the application, the Court refused to amend a *f. fa.* by inserting the *testatum* clause.

WILDE, Serjt., had obtained a rule *nisi*, calling on the plaintiff to show cause why a writ of *feri facias* issued in this cause should not be set aside for irregularity, and the money levied under it be paid to the administrator *cum testamento annexo* of the defendant, who had died since the issuing of the writ.

Taddy, Serjt., at the same time obtained a rule *nisi* to amend the writ by inserting the *testatum*, the omission of which was the ground relied on for setting it aside; and he relied on *Meyer v. Bing*, 1 H. Bl. 541, where this Court permitted a *f. fa.* to be amended by the insertion of the *testatum* clause.

Wilde. Such amendments are only allowed when third persons are not affected, and no new interests have intervened. In *Inman v. Huish*, [238] 2 N. R. 133, the Court refused to amend a *testatum capias*, because the bail would be affected by the amendment. In *Hunt v. Pasman*, 4 M. & S. 329, the Court refused to amend a *f. fa.* where the defendant had become bankrupt before sale of the goods taken under it; and in *Johnson v. Dobell*, 1 M. & P. 28, the Court refused to permit a *capias* to be amended, unless the plaintiff would consent to discharge the bail on the defendant's entering a common appearance.

Taddy. An administrator stands in the same situation as the defendant, especially after execution executed, as here; his situation is very different from that of bail or assignee.

TINDAL, C. J. This case falls within the exception to ordinary cases of amendment. The insertion of the *testatum* is not a matter of importance, and would be permitted in ordinary cases. But it is a good ground of distinction, if the Court can see that the parties are not in the same situation. Here, the defendant has died since the execution of the writ, and the administrator who succeeds may have suffered a judgment for the benefit of other creditors. At all events, the interest of others may be affected. The rule for the amendment, therefore, must be discharged, and the rule for setting aside the writ be made

Absolute.

*HUGHES v. BRETT. Nov. 16.

[*239]

Affidavit "that defendant was indebted to plaintiff on a bill drawn by M. D. upon and accepted by defendant and endorsed by M. D. to plaintiff" (without saying that the bill was drawn payable to order), Held sufficient to hold defendant to bail.

JONES, Serjt., obtained a rule *nisi* to set aside the bail-bond in this case, for an alleged defect in the affidavit to hold to bail.

The plaintiff had deposed that the defendant was indebted to him in the sum of 250*l*. "on a bill of exchange drawn by M. J. J. Donlan upon and accepted by the defendant, and endorsed by M. J. J. Donlan to the plaintiff."

It was objected, that as the bill was not stated to have been made payable to order, it did not appear that Donlan had any authority to transfer it by endorsement, or in what character the plaintiff was entitled to sue: and *Balbi v. Batley*, 6 Taunt. 25, was relied on, where an affidavit that the defendant was indebted on promissory notes, without saying that they were given, or payable, or endorsed to the plaintiff, was holden insufficient.

Wilde, Serjt., who showed cause, relied on *Bradshaw v. Saddington*, 7 East, 94, confirmed by *Bennett v. Dawson*, 4 Bingh. 609, 1 M. & P. 594, where the Court admitted that the cases were conflicting, and that, therefore, they must have recourse to common sense; they then said, that the true principle was to support the affidavit, if perjury could be assigned on it: and held an affidavit precisely similar to the present to be sufficient.

Jones. *Bradshaw v. Saddington*, on which the Court relied in *Bennett v. Dawson*, was decided on a wrong *principle; namely, that if it was sworn *240] the defendant was indebted, and in a sufficient amount, perjury might be assigned. But it would not be safe to deprive a defendant of his liberty without calling on the plaintiff to show the character in which he sued, or at least that he had authority to sue: for the defendant might be indebted, and to a great amount, and yet the debt might be one on which the plaintiff might have no right to hold him to bail; as an equitable debt; and on the allegation of which, therefore, it might be impossible to indict him for perjury. In *Bennett v. Dawson* it was sworn, that the defendant was indebted for money lent on a bill of exchange, which entirely distinguishes it from the present case, as the loan was sufficient to constitute a debt. In *Cathrow v. Hagger*, 8 East, 106, and *Fenton v. Ellis*, 6 Taunt. 192, it was holden not sufficient to depose that the defendant was indebted for goods sold and delivered, without adding "by the plaintiff." And *Balbi v. Batley* was subsequent to *Bradshaw v. Saddington*.

TINDAL, C. J. We think the affidavit is sufficient. It states that the defendant was indebted to the plaintiff in the sum of 250*l*. on a bill of exchange, drawn by M. J. J. Donlan upon and accepted by the defendant, endorsed by M. J. J. Donlan to the plaintiff, and now due and unpaid. The only objection is, that it is not stated the bill was drawn payable to order. Now the defendant, as acceptor, is the person primarily liable to pay the bill; and it was unnecessary for the holder to show whether he claimed through one or many endorsements. It was sufficient for him to say generally, that the bill passed to him by endorsement, on which allegation, if the fact were not so, perjury might *241] have been assigned. Whatever may have been laid down on the *subject in prior decisions, it is better to adhere to the last, and not involve plaintiffs in distinctions too subtle for ordinary apprehensions. If the Court can see that there is a sufficient debt existing, that it is alleged with sufficient precision to save the defendant from being arrested a second time for the same cause, and that perjury can be assigned on the affidavit, all has been done that can reasonably be required. This was the principle on which the Court decided in *Bennett v. Dawson*, and to this it is better we should now adhere.

PARK, J. In *Bennett v. Dawson*, the Court endeavoured to get at a sound principle, and I think we ought not to recede from that decision.

BURROUGH, J. The affidavit is sufficient; and if we had heard it at first, we should not have granted a rule nisi.

GASELEE, J. I should think the rule nisi ought to have been granted; and it is only on the authority which has been cited to-day, that I am prepared to say the affidavit is sufficient. I am not sure that *Bennett v. Dawson* is quite in point, because there it appeared on the affidavit, that, independently of the bill of exchange, the defendant was indebted for money lent. But *Bradshaw v. Saddington* was quoted and relied on in that case; and on the authority of that

decision I hold the present affidavit sufficient. If, instead of one, there had been ten endorsements in this case, it would not have been necessary for the plaintiff to have traced the whole chain: and as it does appear the bill was accepted by the defendant and endorsed to the plaintiff, a sufficient title is shown, and the rule must be
Discharged.

*CHARRINGTON v. LAING. Nov. 17.

[*242]

In an action on the case, defendant gave a *cognovit* for 200*l.*, with a defeasance conditioned for the performance of various matters by a given time, and performed the matters (in part at least) within two months after the time stipulated. Plaintiff having issued execution on the *cognovit*, the Court referred it to the prothonotary, to see how much, if anything, ought to be paid to the plaintiff.

THE defendant having been sued for damages occasioned by his breaking up a highway, gave in December last a *cognovit* for 200*l.*, with a defeasance, under which it was provided, that execution should not be sued out if the road were reinstated to the satisfaction of Smith, a surveyor, by the 15th of April. The defendant paid the plaintiff's costs; but the road was not reinstated to Smith's satisfaction till the middle of June, and the plaintiff sued out execution for the 200*l.* on the 4th of May.

The defeasance was as follows:—That if defendant should pay to plaintiff his costs, and reinstate the road to the satisfaction of Smith, by the 15th of April, 1829 (according to various minute stipulations therein set forth), it was thereby agreed that the defendant, from time to time, and at all times, duly and properly fulfilling all and every the articles, agreements, and stipulations aforesaid, no judgment should be entered up, nor execution thereon be issued for the damages, costs, charges, and expenses aforesaid, or any part thereof; but in case default should at any time be made in performance of any one or more of the said several articles, agreements, and stipulations thereinbefore contained on the part of deponent, the said plaintiff was to be at full liberty forthwith to enter up judgment for the said damages, costs, charges, and expenses, and to issue one or more writ or writs of execution on the said judgment for the said damages, costs, charges, and expenses, or so much thereof as might then remain unpaid."

Jones, Serjt., obtained a rule nisi to set aside the execution, upon affidavits containing the above statement; alleging also the impracticability of making a road in the winter months, and that Smith's attendance could not be procured till the middle of April, when he gave further orders, which
were attended to. [*243]

Taddy and Wilde, Serjt., showed cause on affidavits, which stated, that the defendant had, previously to the *cognovit*, repeatedly violated his engagement to reinstate the road; that the road was not yet completed; that the winter was a proper season for roadmaking; and that the plaintiff and others along the line of road had suffered great inconvenience from its long continuance in an unfinished state. They argued, that the Court could not estimate the inconvenience and damage the plaintiff had sustained by being obliged to resort to other roads; that the *cognovit* was in the nature of liquidated damages agreed on by the defendant, and that the Court had not authority to interfere. In cases of judgments entered up under warrants of attorney, the Court interposed by virtue of their jurisdiction over the warrant, and the statute of W. 8, requiring an assignment of breaches and assessment of damages on them, was confined to bonds.

Jones. The 200*l.* is in the nature of a penalty to secure the performance of the defendant's undertaking. The defeasance contains many stipulations of various degrees of importance; and as it is not stated in respect of which of them the 200*l.* is to be paid, it cannot be considered as liquidated damages; Kemble

v. Farren, 6 Bingh. 141, *Astley v. Weldon*, 2 B. & P. 346. It would be unjust that the plaintiff should have the penalty after the road has been reinstated. At all events, the Court will refer it to its officer to see whether the road be in a proper state or not; and if not, to ascertain how much ought to be paid to the plaintiff in respect of the deficiency, or of any damage occasioned to him by the delay.

*244] *TINDAL, C. J. We do not say that a *cognovit* may not be so worded as to render the sum secured by it payable in the same way as liquidated damages. But the question here is, whether we can consider this *cognovit* as any other than a security by penalty for certain work to be done by the defendant. In the defeasance there are stipulations of various degrees of importance; and as it would be unjust to say that if the road were completed only one day after the term agreed on, the defendant should pay the whole 200*l.*, it would be equally so to say he should pay the whole after performance of a portion of the work. We must, therefore, refer it to the prothonotary to ascertain what has been done; what damage, if any, the plaintiff has sustained; and how much, if anything, ought to be paid to the plaintiff.

Referred to the prothonotary accordingly.

HARGREAVE *v.* SMEE. Nov. 17.

I do hereby agree to guaranty the payment of goods to be delivered in umbrellas and parasols to J. and E. A. S., according to the custom of their trading with you, in the sum of 200*l.*:
Held, a continuing guarantee.

THIS was an action of *assumpsit*, and the declaration contained two special counts upon the guarantee hereafter mentioned; counts for goods bargained and sold to the defendant, and delivered to John and Edward Augustus Smees; and a count upon an account stated between the plaintiff and the defendant. The defendant pleaded the general issue. The cause was tried before Tindal, C. J., London adjourned sittings after last Trinity term, when a verdict was found for the plaintiff for 200*l.*, subject to the opinion of the Court on the following case:—

On the 5th of June, 1828, the defendant signed the following guarantee:—

“5th of June, 1828.

“Mr. John Hargreave,—I do hereby agree to guaranty the payment of
*245] goods to be delivered in umbrellas *and parasols to John and Edward Augustus Smees, at No 38 Milk Street, Cheapside, London, according to the custom of their trading with you, in the sum of 200*l.* I am, &c.

J. SMEE.”

The custom of trading between the plaintiff and Messrs. John and Edward Augustus Smees, the sons of the defendant, was to make up monthly accounts of goods delivered between the 20th day of each month, and the 20th day of the next succeeding month; and upon such making up and adjusting the account, acceptances of the said Messrs. J. and E. A. Smees were given for the amount of each monthly account, payable at three months' date.

The plaintiff had sold and delivered to J. and E. A. Smees, since the 5th of June, 1828, and previously to the commencement of this action, umbrellas and parasols, according to the custom of their trading with the plaintiff, amounting altogether to the sum of 520*l.* 8*s.* 2*d.*

The said J. and E. A. Smees had, since the sale and delivery of the umbrellas and parasols to them, paid the plaintiff various sums of money on account of the umbrellas and parasols so sold and delivered, which amounted altogether to 276*l.* 1*s.* 5*d.*; that is to say,

For the amount of umbrellas and parasols sold and delivered	£	s.	d.
on and from the 5th of June 1828 to the 20th of the same month.	31	18	8
Ditto, from 20th of June to 20th of July following.	24	10	11
Ditto, from 20th July to 20th August, following.	59	12	3
Ditto, on account of umbrellas and parasols sold and delivered from 20th August to 20th September.	160	0	0
	£276	1	5

*There remained due from the said J. and E. A. Smeë to the plaintiff, on the balance of the said account, for umbrellas and parasols so sold and delivered since the 17th September, 1828, the sum of 200*l.* and upwards. [*246]

The credit and time for the payment of the price of the said goods, according to the said custom of trading between the plaintiff and J. and E. A. Smeë, had elapsed at and before the time of the commencement of this action. And the said J. and E. A. Smeë had, before the commencement of the action, been applied to by the plaintiff for the balance so remaining due to the plaintiff, and had not paid the same; whereof the defendant had notice before the action was brought, and was requested by the plaintiff to pay him the said sum of 200*l.* upon his said guarantee.

The question for the opinion of the Court was, Whether the said guarantee was a continuing guarantee or not? And if the Court should be of opinion that it was a continuing guarantee, the verdict was to be entered for the plaintiff as aforesaid; but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

Wilde, Serjt. for the plaintiff. This was a continuing guarantee. The Court will construe the instrument according to the intention of the parties to be collected from it; and if there be any doubt, will take it most strongly against the party bound. When, as here, the agreement is between parties in trade, it will be construed liberally, *propter simplicitatem laicorum*. As the goods were to be delivered according to the custom of their trading, and the jury have found that it was the custom of the parties to account monthly, there must have been a previous dealing, and a continuing engagement must have been contemplated. In *Mason v. Pritchard*, 12 East, 227, the guarantee was "for any *goods" [*247] *Mason* hath or may supply my brother W. P. with, to the amount of 100*l.*; and in *Merle v. Wells*, 2 Campb. 413, "for any debt my brother may contract for goods necessary in his business as a jeweller, not exceeding 100*l.* after this date:" both of which instruments the Court held to be continuing guarantees. In *Melville v. Hayden*, 3 B. & A. 593, where the guarantee was holden to be limited, the language was, "to the extent of 60*l.* for goods to be purchased." There was no allusion to any course of business, nor was the guarantee for any goods that might be furnished.

Spankie, Serjt., *contrâ*. The principle laid down in *Wright v. Russell*, 2 W. Bl. 934, *Pearsall v. Summerset*, 4 Taunt. 593, and other cases, is, that a surety is not to be charged beyond the precise terms of his engagement; and the defendant's guarantee would be satisfied by one delivery of goods to the extent of 200*l.* The expression, "according to the custom of their trading," does not necessarily denote that there had been any previous dealing, and may be satisfied by a future delivery upon a single occasion according to the custom of persons engaged in the same trade. In like manner it was holden, that the stipulation for a quarterly account in *Melville v. Hayden* was applicable only to a future dealing, and would not constitute a continuing guarantee. That case cannot be distinguished from the present; and it would not follow, even if there had been a previous dealing, that the guarantee would be a continuing engagement. In *Kirby v. Duke of Marlborough*, 2 M. & S. 18, the guarantee was held to be restricted to an advance once made to the extent guaranteed, although the condition of the bond was "for the payment to Kirby of all such sum or sums of

*248] money, not exceeding 3000*l.* with lawful interest, *which should or might, at any time or times thereafter, be advanced and lent by Kirby to Coburn, or paid to his use by his order and direction, to enable him to carry on the trade in which he was engaged ;” and that is a much stronger case than the present. In *Evans v. Whyte*, 5 Bingh. 485, Best, C. J., said, that the construction of these instruments ought to be strict. In *Bastow v. Bennett*, 3 Campb. 220, and other cases, the guarantee has been held continuing on the strength of the word *any*, which shows the engagement is not to be confined to one dealing, and which is not employed in this guarantee.

Wilde. In *Kirby v. Duke of Marlborough* it was clearly indicated by the recital of the deed, that the guarantee was to be limited to one set of advances ; it being stated there, that Coburn had occasion for divers sums of money, not exceeding in the whole 3000*l.*, to enable him to carry on the trade in which he was engaged.

TINDAL, C. J. The question is, What is the fair import to be collected from the language used in this guarantee ? The words employed are the words of the defendant in this cause, and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself. From the present agreement, I collect that there were two parties already in a course of dealing : when the defendant goes to guaranty the payment of goods to be delivered according to their custom of trading, I cannot but imply there had been some preceding dealing, and I am confirmed in this by the finding of the jury, that the custom of the parties was to *make up certain monthly accounts. I collect, thence, an intention that *249] this course of dealing should continue, which would render the guarantee a continuing guarantee. If we were to put on it the limited construction which has been contended for, we should deprive the party of the benefit which appears to have been contemplated. If one supply of goods to the extent of 200*l.* would satisfy the stipulation in dispute, there is no course of trading to which the words, “in their course of trading,” could be applied. The cases on this subject run so nearly into each other that it is difficult to reconcile them ; but the distinction between this case and *Melville v. Hayden* is, that here the defendant meant to keep two persons engaged in trade, in their established custom of trading. The verdict must be entered for the plaintiff.

PARK, J. It has been conceded, that all these cases must be decided, each on its own ground ; and, therefore, it is useless to refer to the decisions, except for any principle which may be incidentally laid down in them. The only question of principle which has been agitated on the present occasion is, whether these instruments are to be construed strictly ; and I am not disposed to hold the doctrine which has been imputed to Lord Wynford, that a guarantee ought to receive a strict construction. That was not the principle adopted in *Mason v. Pritchard*, by Mr. Baron Wood, who tried the cause, and the very learned persons who decided it in the Court of King’s Bench. They all held it to be a continuing guarantee, and said it must be taken as strongly as possible against the party who executed it. The true sense has been put by my Lord Chief Justice on the words, “delivery according to their custom of trading ;” and when we consider that the persons to whom the goods were to be delivered were *250] the *sons of the defendant, we should defeat the intention of the parties if we were to hold that his liability was determined upon a single delivery of goods to the amount of 200*l.*

There is enough here to show that the guarantee was to continue till notice should be given to determine it.

BURROUGH, J. I hope the time will come when more reliance will be placed on principles than on cases. I have no doubt as to the intention of the parties here ; they allude to their custom of trading, which has been found to apply to an accounting monthly ; the custom is continuing, and the obligation must be

continuing also. These are commercial agreements, and ought to receive a liberal, not a strict construction. I have no doubt of the meaning here, and the verdict ought to be entered for the plaintiff.

GASELEE, J. I have great difficulty in deciding this case, and am rather inclined to come to a different conclusion. It is hard to distinguish it from *Melville v. Hayden*: there the parties were to account quarterly, and yet the Court held the guarantee to be restricted to a single dealing. There are, however, other facts in this case, which are in favour of the decision which the Court has pronounced.

Judgment for the plaintiff.

⁴The KING v. The Sheriff of MIDDLESEX, in the cause of LOGAN v. LOUEL. Nov. 18. [251]

Where added bail are, upon a discovery made subsequent to their allowance, rejected by the Court, the bail below (their names remaining on the recognisance) are, before the rejection of the bail above, competent to render the defendant.

SPANKIE, Serjt., on the part of the bail to the sheriff, the defendant's attorney, obtained a rule nisi to discharge an attachment against the sheriff on an affidavit which stated, that bail above was put in on the 25th of June; that upon notice of exception two new bail were added, and that on the 30th June notice of allowance of such added bail was served on the plaintiff; that on the 1st July the plaintiff obtained a rule, calling on the defendant to show cause why the rule for the allowance of the said bail should not be set aside, and calling on Walden, one of the added bail, to appear in Court, and answer such matters as should be demanded of him; that this rule was made absolute on the 6th of July; that the present attachment was issued on the 7th, but that the bail below, his name still appearing on the recognisance, had on the 3d of July rendered the defendant in discharge of his bail; that this application was made on the part of the bail below at his own expense, for his only indemnity, and without collusion with the defendant.

Wilde and Jones, Serjts., showed cause on an affidavit which stated that added bail in the cause had, after allowance, been rejected upon examination in Court, and that the sheriff had taken but one surety, who was the attorney in the cause.

They objected, that the affidavit in support of the application did not state, as it ought to have done, that the applicant was not indemnified by the defendant;—that the application ought to have been made by the sheriff, and not by the sheriff's bail;—that a sheriff *who took but one surety, and that surety the attorney in the cause, was entitled to no favour; *George v. Barnes*, 1 Chitty, 8, R. v. Sheriff of London, 2 Bingh. 227;—but above all, that where the added bail were rejected, the bail below were not competent to render the defendant; *Brown v. Jennings*, 2 B. & A. 768; they ceased to be bail when new bail were added: and the added bail, if rejected, were equally out of the cause. In *Mills v. Head*, 1 N. R. 187, it was expressly decided, that for this reason rejected bail were incompetent to surrender the defendant.

Spankie. While the names of the original bail are on the bail-piece, they are liable to an action, and, therefore, competent to surrender the defendant. *Wilde v. Harden*, 8 Mod. 281. In *Bell v. Gate*, 1 Taunt. 163, Heath, J., said, "This Court has in several instances freed the practice from the niceties which formerly prevailed in it respecting bail. It was once held, that after bail had been rejected they could not surrender their principal. It is now held, that they may enter into a new recognisance for the purpose of making the render, and that any persons whatsoever, even if they come out of Newgate, may become

bail for that purpose." And in *Hale v. Walker*, 1 H. Bl. 638, the Court said that any bail was sufficient, even such as had not justified. *Edwin v. Allen*, 5 T. R. 401, and *Rex v. Sheriff of Essex*, 5 T. R. 633, are authorities to the same effect. And *Brown v. Jennings* is distinguishable, because there the Court acted on the ground that the bail above had been contumacious, and that the defendant was seeking to derive an advantage from his own misconduct. The circumstance that the sheriff took the attorney as a surety is no bar to *253] relief. *Jackson v. Trinder*, 1 W. Bl. 1181. As to the affidavit, *it is in the form prescribed by the rule of the Court of King's Bench.

Cur. adv. vult.

TINDAL, C. J. This was a rule obtained by the bail below for setting aside an attachment against the sheriff of Middlesex for not bringing in the body; and the main question is, Whether the render by the bail is good?

As to which, it appeared that bail above was put in on the 25th of June, and notice of exception having been given, two new bail were added; and on the 30th of June notice of allowance of such added bail was served on the plaintiff.

On the 1st of July, the plaintiff obtained a rule to show cause on Friday then next, why the rule for the allowance of the said bail should not be discharged; and that Walden, one of the added bail, should appear personally in Court to answer such matters as should be demanded of him. Cause was shown against this rule on Monday the 6th, when the same was made absolute; and the attachment against the sheriff issued on the 7th.

In the meantime, however, viz. on Friday the 3d July, the names of the original bail, and also of the added bail, still appearing on the recognisance, the defendant was rendered in discharge of his bail generally, and committed to the Fleet. And the question is, Whether this is a valid render? and we are all of opinion that it is.

If the second bail had been rejected on the day they came up to justify, there is no doubt but that the defendant might have been rendered by the first bail at any time during the sitting of the Court.

The first bail appear to be liable up to the time of justification of the second bail. But in this case the justification of the second bail by matters *ex post facto*, became a nullity; and the second bail are to be considered as if they had never been put in at all.

*254] The first bail, therefore, being still upon the recognisance, no step having been taken to remove their names, still remained liable to the plaintiff, and, consequently, capable of rendering the defendant.

The present case, therefore, is distinguishable from the case of *Mills v. Head*, where the bail who had made the render had been rejected, which these first bail had not; and also from the case of *Brown v. Jennings*, where the render was made by the bail, whose justification was afterwards set aside by the Court, on the ground of perjury.

And when it is considered that the plaintiff, by the render of the defendant, has the very security which he originally contemplated when he arrested his person, it is not to be wondered at that the cases have gone such length in allowing renders in discharge of the bail.

Thus a render by bail before they have justified, even though notice of exception has been given,—in the King's Bench;—a render by rejected bail, whilst their names remain on the bail-piece,—in this Court;—a render by rejected bail, who have entered into a new recognisance for the mere purpose of rendering,—have all been held to discharge the bail.

As to the objection that the party applying does not sufficiently deny that he has been indemnified, we think the affidavit sufficient, as it follows the very words of the rule in B. R., which has been adopted by practice in this Court. And as to the application being made by the sheriff's bail, and not by the sheriff himself, we observe that has occurred in many instances, and there appears no reason against it.

On the whole, therefore, we think the rule for setting aside this attachment against the sheriff ought to be made absolute. Rule absolute accordingly.

Wilde now prayed that the bail-bond might stand as security, but the Court refused.

*LEGGETT v. FINLAY. Nov. 20.

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By a judge's order, an award was to be made by the first day of Trinity term, or such further day as the arbitrator should appoint by endorsement on the order. The arbitrator enlarged the time by endorsement, and before the expiration of the enlarged time, one of the parties, at his request, procured a judge's order for a further enlargement, which was acted on by all parties, and the arbitrator made his award beyond the time of the first enlargement, but within the time so further enlarged, but made no further endorsement on the original order: Held, that he had authority for making his award.

WILDE, Serjt., obtained a rule *nisi* on the part of the plaintiff, to set aside the award in this case, on the ground that it had not been made till after the expiration of the arbitrator's authority.

The matter had been referred under a judge's order, according to which the award was to be made by the first day of Trinity term, or such further day as the arbitrator should appoint by endorsement on the order.

The arbitrator enlarged the time once by endorsement, but the enlarged period being nearly elapsed, the plaintiff's attorney, at the arbitrator's request, on the 7th July obtained another judge's order, which was made a rule of court, authorizing the arbitrator further to extend the time to the fourth day of this term, and served this order on the arbitrator.

The arbitrator then appointed another meeting for the 21st of October, which the defendant attended; but the plaintiff absented himself, alleging as a ground for so doing, that he had been unable to procure a meeting of certain surveyors, who were to have given a joint opinion. The arbitrator made his award on the 28th of October, without any further endorsement on the original judge's order.

Adams and Bompas, Serjts., showed cause. The time having been enlarged by a judge's order, a second endorsement was unnecessary; and it is doubtful whether the arbitrator had authority to make more than one. The time for making an award may be enlarged by a judge's order, with as much propriety as the cause may be originally referred by such order. But even if it were otherwise, as the plaintiff himself procured the order for enlarging the time at the arbitrator's request, and as he never assigned the want of authority as a reason for not attending the meeting of the 21st October, he must be taken to have assented to the enlargement. In *The King* (in aid of *Milton*) v. *Hill*, 7 Price, 636, where the defendants in an extent in aid withdrew their pleas, and suffered judgment to be entered up upon an agreement to submit to arbitration the question of the amount of what was due to the prosecutor, provided the award should be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time in consequence of the defendant having delayed to furnish him with the name of a trustee, and the defendant's solicitor afterwards wrote a letter, requiring that the arbitrator would take into consideration matters not before him during the reference,—it was held by the Court, that under those circumstances the delay in making the award had not invalidated it, for that the conduct of the defendant, and the solicitor's letter, was equivalent to a consent to extend the time. And in *Matson v. Trower*, 1 R. & Mood. 17, an award was held good, though made by an umpire, the arbitrators having no authority to appoint one, and though he examined the parties separately, they having attended him and made no objection.

Wilde. The judge's second order was no sufficient authority for enlarging the time, at least without an endorsement by the arbitrator; and as to the sup-

posed assent by the plaintiff, it would be without mutuality, and, therefore, without effect, unless accompanied with an assent on the part of the defendant.

TINDAL, C. J. This rule must be discharged. The objection to the award is, that according to the power originally delegated to the arbitrator, the time *257] for making his award could only be enlarged by endorsement in his hand-writing. It seems to be admitted on the part of the plaintiff, that such a power is not confined to a single enlargement of the time; but it is urged that there is here no endorsement to warrant the second enlargement. If, however, it appears that the parties consented to make an application for a judge's order to authorize a second enlargement, we think that a sufficiently formal mode of concurring in the enlargement to warrant the arbitrator in proceeding; and the only question here is, Whether there be sufficient evidence of such concurrence. Now here the plaintiff concurs in applying for the order, at the request of the arbitrator; he shows a readiness to act under it, and when a meeting is appointed absents himself, not on the ground that the arbitrator was without authority, but because he had been unable to effect a meeting of certain surveyors. As to the mutuality of consent, which it is said ought to appear on the part of the defendant, to make the plaintiff's consent available, we think it sufficiently appears by the defendant's attending the meeting in question.

PARK, J., and BURROUGH, J., concurred.

GASELEE, J. I was disposed to think at first that this enlargement was made without authority; but upon hearing the circumstances of the case, I think a sufficient authority has been shown. It is clear that parties may confer a sufficient authority by consent; — as by attending meetings; — and here, what is equivalent to consent has taken place on both sides. Rule discharged.

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*TOWLER *v.* CHATTERTON. Nov. 20.

Plaintiff sued in Hilary term, 1829, on a debt which accrued more than six years before: Held, that the 9 G. 4, c. 14, which came into operation on the 1st of January, 1829, precluded him from recovering on an oral promise to pay the debt, made by defendant in February, 1828.

ASSUMPSIT for the agistment of cattle. The action was commenced in Hilary term 1829. At the trial before Best, C. J., Lincoln Lent assizes, it appeared that the debt was, at the time the action commenced, of more than six years' standing, but that in February 1828 the defendant said to the plaintiff's brother, "I owe your brother seven or eight pounds, and if I do, he shall have it; I wish that nobody should lose anything by me." And at another time, "Your brother Ned wants seven or eight pounds from me: we must settle it. Nobody shall lose by me." The jury held this to be a promise to pay.

On the part of the defendant it was objected, that by the 9 G. 4, c. 14, which passed May 9, 1828, but by section 10 was to commence and take effect on the 1st of January, 1829, it is enacted, "that in actions of debt, or upon the case, grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments (statute of limitations, 21 Jac. 1, c. 16) or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby."

The learned Chief Justice nonsuited the plaintiff, on the ground that the promise should have been in writing, giving to the plaintiff leave to move to set the nonsuit aside. Accordingly

*259] *Mereuether*, Serjt., in Easter term last, moved the *Court for that purpose, contending that the act did not apply to promises made before the 1st of January, 1829; there was no express provision to give it a retrospective effect; and without such a provision the Court would not sanction a construction which all the text writers on law had deprecated as productive of injustice.

Thus Blackstone, after reprobating the imperfect promulgation of laws, adds, "There is still a more unreasonable method than this, which is called making laws *ex post facto*."—"All law should be, therefore, made to commence *in futuro*," &c. 1 Bl. Com. 46. And it has been expressly laid down that a statute made in the affirmative, without any negative express or implied, does not take away the common law. 4 Bac. Abr. 641. Lord Coke, in commenting on the statute of Gloucester, 6 Ed. 1, c. 78, s. 3, at the words "if a man alien a tenement," says, "This extendeth to alienations made *after* the statute, and *not before*; for it is a rule of law of parliament, that regularly *nova constitutio futuris formam imponere debet non præteritis*." 2 Inst. 292. And, according to him, "an act of parliament shall never be so construed as to do an injustice." 8 Rep. 136 b, Sir Francis Barrington's case. *Gilmore v. Shuter*, Jones's Rep. 108, S. C. 2 Show. 17, 2 Mod. 310, 1 Lev. 227, 1 Ventr. 330, nearly resembles the present case. That was an action of *assumpsit* on a promise that in consideration plaintiff, at the request of H. Shuter, would marry the daughter of one Harris, Shuter agreed to give plaintiff in his lifetime, or leave him at his death, as much as Harris should give in portion with his daughter. Averment, that Harris gave in portion 2000*l.*, but that Shuter omitted to fulfil his promise. Plea, *non assumpsit*. The jury found, in a special verdict, that the promise was made in February 1676; that there was no *note* or *writing*; and that Shuter died in August *1677. The 29 Car. 2 passed in 1676; was read a third time in the House of Lords, March 7; and by s. 4 provided, "That from and after the 24th of June, 1677, no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, &c., unless the agreement upon which such action should be brought, or some memorandum thereof, shall be in writing, and signed by the party, or some other person thereunto by him lawfully authorized." The only question was, whether a promise made before the new act, but to be performed after, would maintain an action without note in writing? Maynard, Serjt., for the defendant, relied on the express words of the act, than which, he said, nothing could be plainer; and it was never heard that negative words in a statute *introductive*, should be interpreted against the express letter. Pollexfen for the plaintiff. "The penning and words of the statute do plainly intend only promises after the 24th of June, and never designed a retrospect to avoid marriage agreements made and concluded at any time before. No act of parliament shall be intended to be made *against natural justice*, as it would be if this act should be taken literally, for then good and legal causes of action for debts and other things, upon promises made upon good and valuable consideration, would be destroyed and utterly taken away by the retrospect of the law, which nobody could divine would be made." And he referred to the judges' opinions at Serjeant's Inn, in a case of a devise of land without three witnesses, made and published before the act, where testator died after the act, and yet it was held good; though it is no devise till after the testator's death. The title and style of the act was plain enough; that designed only a prospect for the future, for it was for the "prevention of frauds." The whole Court (except *Twisden, who, being sick, was absent) were of opinion that the action lay notwithstanding the act; and the justices agreed unanimously that the act did not extend to promises before the 24th of June, and judgment was given for the plaintiff. They said that by an easy transposition of the words of the act, a construction agreeable to justice might be made, viz. where the words are, "after the 24th of June, no action shall be brought for a promise of marriage without note or writing," &c., the words so transposed, "no action shall be brought for any promise after the 24th of June," there is no retrospect or other injury to any one; and it is usual to make such transposition of words to make private contracts agree with the intention of the parties; as upon a lease dated 26th of March for years, rendering rent at the Annunciation and Michaelmas, during the term, the first rent shall be paid at Michaelmas. *A fortiori*, to make acts of parliament not repugnant to common justice.

In *Couch v. Jeffries*, 4 Burr, 2460, in an action for a penalty for not paying the stamp duty on an indenture of apprenticeship, after a verdict for plaintiff, a motion was made to stay the judgment, on the ground that defendant had since paid the duties under the 9 G. 3, c. 37, s. 4, which discharges the penalty on payment of the duties by Sept. 1, 1769. The action was brought and tried before the making of that act; and the question was, whether the act should relate to actions commenced before the first day of the session in which it passed? There was no proviso to save actions already commenced, but Lord Mansfield said, "Here is a right vested; and it is not to be imagined that the legislature could, by general words, mean to take it away from the person in *262] whom it was so legally vested, and who had *been at a great deal of cost and charge in prosecuting. They certainly meant future actions." The rule was discharged. *Gilmore v. Shuter* was recognised in this case as an authority. In *Wilkinson v. Meyer*, *Ld. Raym.* 1352, an action of covenant on an indenture for the transfer of South Sea stock, the defendant having pleaded that the contract was not duly registered according to 7 G. 1, stat. 2, s. 8, which was passed subsequently to the date of the indenture, *Raymond, J.*, said, "that this act being *ex post facto*, the construction of the words ought not to be strained, in order to defeat a contract, to the benefit whereof the party was well entitled at the time the contract was made," and judgment was given for the plaintiff.

The Court granted a rule *nisi*, against which

Adams, Serjt., showed cause. He relied on the express and unqualified language of the statute, and particularly on the clause by which its operation was postponed from the day on which it passed to the 1st of January, 1829, apparently with the express intention of permitting the successful prosecution of actions actually commenced at the time the act passed.

Merewether was heard in support of his rule, and the cause stood over till this term.

The judgment of the Court was this day delivered as follows by

PARK, J. This was an action brought for the agistment of cattle. The debt was, at the time of the action brought, of above six years' standing.

The evidence was, that the defendant was at the house of the witness in February 1828, and said "I owe *your brother seven or eight pounds, and *263] if I do he shall have it, I wish that nobody should lose anything by me;" at another time defendant said, "your brother Ned wants seven or eight pounds from me, we must settle it, nobody shall lose by me."

The action was not brought till Hilary term of the present year.

If this *verbal* promise was good, the promise was within six years, but more than six years since the cause of action first accrued had elapsed when the action was brought; and it was insisted, that the plaintiff could not recover, for that, by the statute of 9 G. 4, c. 14, commonly called Lord Tenterden's act, in cases of simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment (that is the statute of limitations), or to deprive any party of the benefit thereof, unless *such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.*

On the other hand, it was said, that, as the promise *by words* in this case was made before the operation of the new statute, the action was maintainable. Lord Chief Justice Best took the opinion of the jury, whether the words proved amounted to a promise to pay. They said they did. His Lordship then nonsuited the plaintiff, on the ground that the promise should have been in *writing* according to the provisions of the new act, giving the plaintiff leave to move to enter a verdict for the sum in proof, if this Court should differ from him.

But my brothers Burrough and Gaselee think, and I agree with them, that this action, not having been brought till Hilary term 1829, and this act having

begun to run from the 1st January in the present year, cannot be maintained upon a *verbal* promise.

*Every man who has attended a court of justice for some years must have observed how very vaguely and loosely many of these verbal promises, which were to take a case, as it was called, *out* of the statute of limitations, were proved; and therefore it well became him, who introduced this act, to endeavour to provide a remedy for so great an evil.

The words of the enactment which I have read, had they stood alone, would probably have had immediate effect from the very day the bill passed, viz., the 9th of May. Nay, according to the old rule, which we all know prevailed some years ago, it would have had its operation from the first day of the session of parliament. But the noble mover of this act, in order to obviate what might by many be deemed a hardship, introduced a clause (now the tenth section of the statute) declaring that this act should not take effect till the 1st of January following, thereby giving all persons in possession of such *parol* promises, seven months and more in which to bring their actions, founded on such promises, if they should be so minded.

If we were not to give the act this construction, it would follow that if a man obtained a *verbal* promise a day or two before the 1st of January, he would still have six years, at any time within which, he might bring his action.

The case of *Gilmour v. Shuter* was pressed upon the Court to show that an act of parliament, viz., the statute of frauds should not have a retrospective operation.

But upon looking at that case, and the statute to which it refers, I do not think it can govern our present decision: because the statute now under review prevents all the mischief which the Judges in the case in *Jones* contemplated, by giving due notice that this law should have no operation till the 1st of January, nearly eight months after its enactment.

*But the present decision is not the first, nor the second that has been made upon this very statute, carrying it farther than the facts of this case require us to do at present. [265

The first I shall mention, though last in point of time, was the decision of a very profound lawyer,—a very strong and clear-headed man, my much valued and excellent friend, whose early and unexpected loss to the world in his judicial capacity, the whole profession and every good man must deeply deplore,—I mean the late Mr. Baron Hullock. At Carlisle, on the 5th March last, in a cause of *Kirkhaugh v. Herbert*, he nonsuited the plaintiff, though the action had been commenced *before* the 1st of January, because he had only a *parol* promise to take the case out of the statute.

But where can we look to a better authority on the subject, than to the noble Lord who framed the law, and brought it into parliament? Lord Tenterden, at the sittings after last Hilary term, at Guildhall, nonsuited the plaintiff, where the action had been commenced before the 1st of January, and a *parol* promise made before that day was offered in evidence to take the case out of the statute of limitations; his Lordship holding that the statute applied, and that the *parol* promise was insufficient.

In these two cases it will be observed, that the action was brought *before*, though not tried till *after* the statute had begun to operate; and, therefore, in that respect, they are stronger than the case at bar.

We are, therefore, of opinion that in this case the rule for setting aside the nonsuit must be discharged.

Rule discharged.

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*CLARKSON v. LAWSON. Nov. 20.

Libel. Defendant published that plaintiff, a proctor, had been suspended three times, *per quod* his neighbours were led to think he had been guilty of extortion. Plea, that he had been suspended once for extortion: Held ill.

THE declaration stated, that, whereas the plaintiff at the time of the committing the several grievances by the defendant, as thereafter mentioned, had been and was and still is one of the proctors general exonerat of the Arches Court of Canterbury, and other ecclesiastical and maritime courts in Doctor's Commons, and had, used, exercised, and carried on the profession and the business of a proctor with great credit and reputation, and had thereby acquired great gains, profits, and advantages, and as such proctor had always conducted himself with great honesty and integrity; yet the defendant well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and in his said profession or business, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this kingdom, and to vex, harass, oppress, impoverish, and wholly ruin him the plaintiff, theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did publish and cause and procure to be published of and concerning the plaintiff, and of and concerning him in his said profession or business, a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and *267] concerning him in his said profession or *business, that is to say,—

“With respect to the employment of proctors, it was strange that Mr. Peddle, who now changed his proctor, should have gone from Mr. Toller to Mr. W. Geery junior (thereby meaning the said plaintiff), who had been suspended three times, once by Lord Stowell, and twice by Sir John Nicholl; he was anxious to particularize his (thereby meaning the said plaintiff's) name, in order to distinguish him from others who did not wish to be confounded with him:” and that the defendant, further contriving and intending as aforesaid, theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did publish a certain other false, scandalous, malicious, and defamatory libel of and concerning the plaintiff, and of and concerning him in his said profession or business, in the form of and as a letter addressed to the editor of the Times newspaper, in which said letter was and is contained, amongst other things, the false, scandalous, defamatory, and libellous matter following, that is to say,—“Sir, Common justice will, I am satisfied, induce you to correct a misprint in your paper of this day in your report of Dr. Lushington's speech upon the subject of the charge against Sir John Nicholl, in which you represent him as stating, that Mr. W. Geery junior was the proctor who had been thrice suspended from practice for extortion; that person, Sir, was William Geering Clarkson (meaning the said plaintiff), and not, Sir, your humble servant, William Geery junior:”

By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff had been greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, in so much that divers of those neighbours, to whom the innocence and *268] integrity of the plaintiff in the premises were unknown, had, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still did suspect and believe the plaintiff to have been and to be a person guilty of extortion, and had, by reason of the committing of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused and still did refuse to have any transaction, acquaintance, or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had; and also by reason thereof the plaintiff had been and was greatly prejudiced in his credit and reputation afore-

said, and had been greatly vexed, harassed, and oppressed and impoverished, and had also lost and been deprived of divers great gains or profits which would otherwise have arisen and accrued to him in his said profession or business, and had been and was otherwise much injured and damnified therein, to wit, at, &c.

The defendant pleaded—as to the publishing the said several supposed libellous matters in the said declaration mentioned, *actio non*, because the plaintiff before the said several times when, &c., in the said declaration mentioned, to wit, on, &c., had been employed in the way of his aforesaid profession and business of a proctor by one Thomas Gillard, and afterwards and before the said several times when, &c., to wit, on, &c., falsely, fraudulently, and extortionately demanded of and from the said Thomas Gillart, as and for the sum of money justly due to him the plaintiff from the said Thomas Gillart for the work and labour of him the plaintiff, as such proctor, done, performed, and bestowed in and about the business of the said Thomas Gillart in pursuance of the aforesaid employment, and for the fees and disbursements due and made to and by him, as such proctor, in *respect thereof, a certain large sum of money, to wit, [*269 the sum of 19*l.* 14*s.* 4*d.*, whereas in truth and in fact, the sum of money then and there justly due to him in that behalf, then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.*; and the defendant further said, that afterwards, and before the said several times when, &c., to wit, on, &c., Sir J. Nicholl, Knight, then being Judge of the Prerogative Court of Canterbury, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of the said Court in that behalf, to wit, the Rev. George Moore, Charles Moore, Esquire, and the Rev. Robert Moore, registrars of the said Court, and that the said officers by their deputy in that behalf, did afterwards, and before the said several times when, &c., to wit, on, &c., report in the said Court to the said Sir J. Nicholl as and being such Judge as aforesaid, according to the course and practice of the said Court, that upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 19*s.* 8*d.* only had been found justly due to the plaintiff from the said Thomas Gillard: and that thereupon, by reason of the premises afterwards and before the said several times when, &c., to wit, on, &c., the said Sir John Nicholl, as and being Judge of the said Court, did order, direct, and adjudge to be suspended, and did suspend the plaintiff from exercising the business of a proctor in the said Court for and during the space of one year then next following, and did then and there direct, that at the expiration of the said space of one year, that the plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all malpractices in the future exercise of his business as a proctor in the said Court: and that the said Sir J. Nicholl and Sir *John Nicholl in the said supposed libel named, [*270 are one and the same person: whereupon the defendant afterwards, at the said several times when, &c., did publish and cause and procure to be published the said supposed libellous matters in the said declaration mentioned, as he lawfully might for the cause aforesaid, which are the same publishing and causing and procuring to be published the said supposed libellous matters as are in the said declaration mentioned.

There was a second plea to the same effect.

Demurrer and joinder.

Cross, Serjt., in support of the demurrer, objected that the pleas were bad, because they professed to furnish an answer to the whole of the charges set out in the declaration, but in effect answered only a part, nothing having been said as to the extortion, or the alleged suspension by Lord Stowell.

Wilde, Serjt., in support of the pleas. The pleas must be viewed with reference to the declaration, and if they answer the sting and substance of the libel as pointed out by the declaration, are sufficient. Here the plaintiff has alleged, as the consequence of the libel, that the public had suspected him to be a person guilty of extortion, and to have been on that account suspended from the exercise of his functions. In his own view of the case, therefore, the charge against

him would have been supported if the defendant had shown that he had committed extortion, in the ordinary sense of the term, and had been suspended. Supposing him to have been once so decidedly fixed with the misconduct imputed, the discredit into which he must thereupon have fallen would not be materially aggravated by a knowledge that the offence had been repeated. In *Edwards v. Bell*, 1 Bingh. 403, the declaration charged the defendant with

*271] publishing the following libel against the plaintiff, a dissenting minister :—“ A serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is to be taken up seriously.” The defendant pleaded that the plaintiff, whilst officiating as minister, published from a part of a chapel assigned to him as minister for the delivery of a sermon, to and in the presence of his congregation of and concerning one M. F., a teacher of a certain Sunday school, the scandalous words following :—“ I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers; her name is Miss Fair; her conduct is a bad example and disgrace to the school; and if any of the children dare ask her to go home she shall be turned out of the school, and never enter it again : Miss Fair does more harm than good :” and thereby gave great offence to divers of the dissenters, to wit, one A. B., and one C. D., and occasioned serious misunderstanding amongst the dissenters. A verdict having been given for defendant upon this plea, it was held, upon motion to enter a verdict for plaintiff *non obstante veredicto*, that the plea was a sufficient answer to the libel charged, although it was objected that the libel alleged the misunderstanding to be among the independent dissenters and their pastor, and the plea justified only a misunderstanding occasioned among the dissenters. Gifford, C. J., said, “ It has been objected *272] *that the libel alleges a misunderstanding to have arisen between the pastor and his congregation, while the justification alleges the misunderstanding to have existed only amongst the congregation; but even in that respect the plea substantially supports the statement contained in the libel, and the rule which has been obtained for the plaintiff must be discharged.” Park, J., said, “ As to the allegation touching the misunderstanding between the congregation and their pastor, the gist of it has been completely met in the language of the plea.” And Burrough, J., said, “ No person can use the pulpit for the purpose of invective against individuals, and the defendants were entitled to justify in this action, by showing that what they had alleged against the plaintiff in that respect, was borne out in fact. In such a case, it is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in the charge which does not add to the sting of it, that need not be justified.”

TINDAL, C. J. The libel as set out in this declaration, alleges that the plaintiff, being a proctor, was suspended from his office three times: twice by Sir J. Nicholl, and once by Lord Stowell. It also charges him with having been guilty of extortion. The plea begins by professing to be an answer to the whole declaration. “ As to the said several supposed libellous matters in the said declaration mentioned, the said plaintiff ought not to have or maintain his aforesaid action.” It professes, therefore, to justify the allegation, that the plaintiff had been suspended three times: but it justifies only to the extent of one of the suspensions, *namely, that upon proof of an improper charge “ Sir John Nicholl, as judge of the said Court, did order, direct, and adjudge, to be suspended, and did suspend the said plaintiff from exercising the business of a proctor in the said Court, for and during the space of one year.” Therefore, looking at the plea and the declaration, the plea seems to fall clearly within that class of cases, in which it has been held that a plea is bad if it profess to be an answer to the whole of a declaration, and answers only a part. It has been

urged, indeed, that it is sufficient if the sting and substance of the libel be answered, and that the discredit attaching to a single suspension from office is not substantially aggravated by a repetition of similar reproof. I cannot but think, however, that if a party be believed to have committed three distinct offences, his character is much more deeply affected than if he has only been charged with the commission of one. The plea, therefore, does not justify the whole of the charge contained in the libel; and it falls within the rule of those decisions where it has been laid down, that a plea which professes to justify the whole, if in effect it justifies only a part, is bad: as in *Jones v. Gittings*, Cro. Eliz. 239, cited in *Craft v. Boite*, 1 Wms. Saund. 244 a, note, where the libel having charged the plaintiff with having stolen cloth and velvet, a plea which justified the accusation only as to taking the velvet, was holden ill. The first plea here, after professing to answer the whole, omits two specific charges, and is therefore bad. The second plea falls within the same rule.

PARK, J. The case of *Edwards v. Bell* is clearly distinguishable. If the preacher there had stated three specific facts in his discourse, and the justification had *gone to only one of them, the case might have been applicable to the present; but it has no bearing whatever, because the matter not [*274 touched on by the plea formed no part of the charge against the plaintiff.

I cannot agree in the position that the plaintiff's character would not have fallen into lower discredit by the imputation of repeated offences than by the imputation of one only. A man who makes one slip, and is suspended, perhaps under the strict letter of some rule of Court, but who is afterwards reinstated upon a proper submission and a promise of correct conduct for the future, cannot be said to stand on the same footing with one who has been suspended three times for repeated misconduct. The libel here states that the plaintiff had been once suspended by Lord Stowell and twice by Sir J. Nicholl; but as far as appears by the plea, he was never suspended by Lord Stowell. The plea, therefore, is ill, having undertaken to justify the whole, and justifying only a part of the libel complained of.

BURROUGH, J. It is a settled rule of law, that pleas are entire, and if bad in part are bad for the whole. The defendant having professed to answer the whole declaration, and having answered only a part, his plea is bad altogether.

GASELEE, J. The case is so clear that I was surprised to find it argued.

Judgment for the plaintiff.

*ASH and Wife and WATTS, Conusors; GYE, Conusee. Nov. 20. [*275

Fine permitted to pass as of a term twenty-two years previous, upon payment of the king's silver, all surviving parties interested consenting, upon its being shown that, unknown to the parties, the clerk instructed to pass it had absconded with money intrusted to him for payment of the king's silver, when that payment alone was wanting to complete the fine.

By a marriage settlement, bearing date in 1807, property belonging to Mrs. Ash and her sister Lucy Watts, two of the conusors, was settled on Mr. Ash for life, remainder to his children by Mrs. Ash, in such proportions as she and Lucy Watts should appoint pursuant to a power reserved in the deed of settlement; and a fine was levied as above to enure to the uses of the settlement. In Trinity term, 1807, this fine proceeded as far as the *allocatur*, and the king's silver was compounded for; but before it was paid, the clerk of the solicitor who was concerned in the business, absconded, taking the money with him, and omitting to disclose to his employer that the fine had not passed, of which all parties remained ignorant till within a few days of this term, when the discovery was made accidentally.

Mrs. Ash and Lucy Watts made appointments in favour of Mrs. Ash's children by Mr. Ash, pursuant to the powers contained in the deed of settlement, and shortly afterwards both died, Lucy Watts being unmarried.

Taddy, Serjt., upon affidavits of these facts, and that all parties interested

(including one of the children, who deposed that he was the heir of Mrs. Ash and of Lucy Watts) were consenting to the application, now moved, that upon payment of the king's silver, this fine might pass as of Trinity term 1807; and *276] he cited *Moule v. Eyles*, 1 B. M. 125, *and *Vin. Abr. Fine*, (Q) 2, pl. 3, as authorities in favour of his application.

The Court took time to consider, and now said, that under the circumstances, they thought it reasonable the fine should pass as prayed. *Fiat.*

KAY v. GROVES. Nov. 21.

"I hereby agree to be answerable to K. for the amount of five sacks of flour, to be delivered to T., payable in one month, Nov. 18. T. G."
Held to be a guarantee for flour, not exceeding five sacks delivered at one time, and not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks.

ASSUMPSIT on the following guarantee:—

"I hereby agree to be answerable to Mr. Kay for the amount of five sacks of flour to be delivered to Mr. W. Taylor, Gray's Inn Lane Road, payable in one month.

"THOMAS GROVES.

"November 18, 1828."

At the trial before Tindal, C. J., Middlesex sittings after Trinity term, it was proved, that on the 19th of November, 1828, the plaintiff delivered to Taylor five sacks of flour. On the 21st, he delivered five more. On the 24th, Taylor sent back three and a half sacks out of the first five, as being of a bad quality, and three and a half other sacks were supplied that day.

For the first parcel Taylor gave a return-ticket to the plaintiff's carman, as follows:—

"Received from Mr. Kay,

"On account of Mr. Groves,

"Five sacks whites.

"W. TAYLOR."

*277] *The return-ticket given for the second parcel was,—

"Received from Symon's Wharf,

"Five sacks flour (Balls)

"On account of Mr. Kay.

"W. TAYLOR."

The defendant paid into court 3*l.* 17*s.*, the price of a sack and a half of flour, and called a witness, who stated that he and the plaintiff had agreed to supply Taylor with five or ten sacks each.

The Chief Justice, observing that the plaintiff had proved no second order from the defendant, nor any agreement on his part that three and a half sacks should be substituted on the 24th November for three and a half sacks delivered on the 19th, and to be paid for within a month from that day, left it to the jury to determine, whether the delivery on the 24th was made under the defendant's guarantee, and in substitution of any part of the delivery on the 19th; or, whether it was made under a new contract. The jury having found for the defendant,

Jones, Serjt., obtained a rule *nisi* for a new trial, on the ground that the guarantee was a continuing guarantee at least to the extent of five sacks, and that the jury should have been directed to find for the plaintiff to that extent.

Wilde, Serjt., who showed cause, contended, that the guarantee was for one delivery of five sacks, to be paid for in a month from the 19th of November, and that the case was properly left to the jury, there being no evidence to show the defendant had consented to extend his liability for five days more, by permitting a delivery on the 24th to be substituted for a delivery on the 19th.

And it would be unreasonable to imply any such assent, *after an intervening delivery of another quantity of five sacks on the 21st, which clearly [*278 was unconnected with the guarantee.

Jones insisted, that the guarantee was not confined to any specific five sacks, but must be taken to extend to that amount, at whatever time, and in whatever manner delivered; as, if the amount had been delivered at many intervals, and by a bushel or a sack at a time, the guarantee bound the defendant to pay for each sack or each bushel (the whole quantity not exceeding five sacks), at one month after the respective deliveries; and there being no evidence that the delivery of the 24th of November was under any new contract, while its corresponding in quantity with the number of sacks returned out of the delivery of the 19th showed conclusively that it was in substitution for that delivery, the jury should have been directed to find for the plaintiff.

TINDAL, C. J. The only question is, whether my direction to the jury was right, and I do not see that the question could have been left to them in any other way. On the 19th November, five sacks were delivered to Taylor on account of the defendant, at a month's credit. Two days afterwards, five other sacks were delivered to Taylor, so that he had then ten sacks; five in respect of which the defendant was liable, and five for which some other person was liable. A few days after this, three and a half sacks of the first lot were returned to the plaintiff. The defendant had then a right to say, although I am liable under my guarantee, I am only liable for what has actually been furnished, which is now, one sack and a half. The plaintiff on the other hand says, That though the defendant's liability began to run from the 19th November, yet he is liable for any *flour sent afterwards, to any extent not exceeding five [*279 sacks in the whole.

I left it to the jury to say, whether the delivery on the 24th was under a new contract or not, and whether the whole quantity guaranteed had been furnished on the 19th. They have found that the delivery on the 24th was not under the guarantee, and that only one sack and a half was retained under the delivery of the 19th; and that finding appears to me to be warranted by the evidence.

PARK, J. Even if the three sacks and a half had been returned before the delivery of the second parcel of five sacks, it would have been a question whether the defendant could have been called on to pay for more than the sack and a half which were retained out of the delivery on the 19th; but the delivery of the second parcel of five sacks, under a different contract, before the delivery of the three sacks and a half, for which the plaintiff now seeks to charge the defendant, seems to remove all doubt. The defendant's liability began to run from the 19th, and it could not be prolonged by a subsequent delivery without evidence of express assent on his part.

BURROUGH, J. The stipulation for one month's credit decides the whole question. The case was properly left to the jury.

GASELEE, J. If the delivery on the 24th was at a month's credit, it does not correspond with the guarantee, which was for a month's credit from the 19th. The defendant might have had confidence in Taylor's solvency for a month from that date; but if the defendant had supposed that the plaintiff, by subsequent *deliveries, could prolong the defendant's responsibility, he might have [*280 declined to enter into any such engagement. Rule discharged.

SHERWOOD v. TAYLER. Nov. 22.

Defendant was arrested for 32*l.*; he tendered 250*l.*, but did not pay it into Court. An arbitrator, to whom the cause was referred, awarded the plaintiff only 250*l.*: Held, not a case to entitle defendant to costs for a malicious and vexatious arrest.

JONES, Serjt., obtained a rule calling on the plaintiff to show cause why the defendant should not be allowed his costs under the 43 G. 3, c. 46, notwith-

standing an award in favour of the plaintiff, on the ground that the defendant had been arrested without reasonable or probable cause.

The plaintiff, a builder, sought to recover 327*l.* for building. The account was complicated, and the defendant tendered 250*l.*, but did not pay it into court. The plaintiff refusing to take that sum, proceeded to arrest the defendant for 327*l.*, who deposited the money in the officer's hands. But an arbitrator, to whom the cause was referred, awarded the plaintiff 250*l.* only.

Wilde, Serjt., who showed cause, contended, that the amount found to be due by the arbitrator was not sufficiently below the sum for which the defendant was arrested, to justify the Court in concluding there was no reasonable and probable cause for the arrest.

The defendant himself must have been doubtful as to the amount, or he would have paid the 250*l.* into court.

**Jones*. According to the principle laid down in *Dronefield v. Archer*, *281] 5 B. & A. 513, there was no probable cause for the arrest after the defendant had tendered a sum corresponding in amount with that which was found due by the arbitrator. In that case it was held, that where, in the account between plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3, c. 46, s. 3; if the plaintiff arrests and holds the defendant to bail for the amount due to him, without, at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. The plaintiff might have reasonable cause for proceeding with his action, but none for depriving the defendant of his liberty; since the circumstance of the tender must have convinced him of the defendant's ability to pay.

TINDAL, C. J. This rule must be discharged. The statute 43 G. 3 directs that the defendant shall be allowed his costs when he is arrested for a larger sum than is found to be due, provided it shall appear to the Court that there was not any reasonable or probable cause for such arrest. It has been contended, that if, under all the circumstances of the case, it was unreasonable in the plaintiff to arrest the defendant, the latter is entitled to his costs; but the construction which has been put on the statute is, that the defendant is only entitled to them if the plaintiff holds him to bail for a sum materially larger than that which is found to be due; and the labouring oar is thrown on the defendant to show that so much was not due. The object of the statute was to save the defendant the

*282] expense and inconvenience of an action for a malicious arrest, and the *proof offered on applications such as the present, must go to the same extent as the proof in such an action. Here, we do not see on the defendant's affidavit that there was not reasonable and probable cause for his arrest. On the contrary, he admits by his tender, that 250*l.* was due, and he so far distrusted his own judgment as to the exact sum, that he abstained from paying into Court the amount tendered. If the defendant conceived he should not be safe in paying in 250*l.*, why should not the plaintiff seek to recover more?

The argument, that the arrest was without probable cause, because the defendant by his tender showed himself solvent to a sufficient amount, proves too much. According to that, the statute would give every defendant his costs where the plaintiff arrested and recovered after a tender; but the recovery of costs by defendants is confined to cases where the arrest is without probable cause.

PARK, J. The act was kindly intended towards defendants, but it has turned out to be a source of much vexation. I concur with the Chief Justice in his exposition of it, and I think it lies on the defendant to show that there was no reasonable or probable cause for the arrest.

BURROUGH, J., concurring, the rule was

Discharged.

GASELEE, J., was absent.

*Sir JOHN TYRELL, Baronet, v. JOHN TYRELL JENNER, sued with the late Archbishop of CANTERBURY. Nov. 24. [*283]

The process in *quare impedit* is by summons, attachment, and great distress; therefore, where plaintiff proceeded by summons, to which *nihil* was returned; then by attachment, which recited that the defendant had been summoned; and then by *distringas*, under which the sheriff was ordered to levy 40s.; the proceedings were held to be irregular.

QUARE IMPEDIT. The defendant, Jenner, was a lunatic in confinement at Hoxton, in Middlesex; the church, of which the plaintiff sought by this action to recover the presentation, was at Midley, in Kent.

On the 17th July, 1828, he issued against the defendant Jenner, a writ of summons returnable on the morrow of All Souls in that year, and, in August, sent a copy of this writ to the attorney of the defendant Jenner's committee.

The return of this writ was *nihil*; *non est inventus*; and *nulla ecclesia*; there being no church on the living.

The plaintiff then issued into Kent against Jenner a writ of attachment, tested November 28th, 1828, and returnable on the morrow of the Purification (February 6th, 1829).

This writ of attachment recited that the defendant Jenner had been summoned to appear on the morrow of All Souls. The return to it was *nihil* and *non est inventus*.

The plaintiff next issued a *distringas* into Kent, ordering the sheriff to make a return of *nulla bona*, which was done accordingly.

He then issued into Middlesex a *testatum distringas*, tested 6th May, 1829, and returnable in five weeks of Easter (27th May), by which the sheriff was required to distrain the defendant by all his goods, lands, and chattels, and to keep them until a further writ issued, *and have his body; but this was accompanied with a direction to the sheriff to levy 40s. The sheriff [*284] returned to this, *distrinxi*.

On the 23d of May, 1829, the plaintiff's attorney gave notice to the attorney of the committee of the defendant Jenner, that in default of the defendant's appearing to the writ of *distringas* at the return thereof, the plaintiff would cause an appearance to be entered for the defendant. But on the 29th of June following, the plaintiff's attorney gave notice to the attorney of the defendant's committee, that in consequence of defendant's not having appeared, judgment was entered up and a writ of inquiry about to issue.

Judgment having been entered up accordingly,

Wilde, Serjt., obtained a rule *nisi* to set it aside as irregular; the plaintiff not having proceeded by the great distress, nor having properly summoned the defendant as he was bound to do under the statute of Marlbridge, 52 Hen. 3, c. 12. He cited *Searle v. Long*, 1 Mod. 248, where the defendant had appeared once on the summons, and cast an *essoïn*, but afterwards was neither summoned on the attachment or the great distress, but nominal summons had been returned on the process; and the Court set aside a judgment by default, on the ground that the process had not been executed as the statute intended.

Russell and *Stephen, Serjts.*, showed cause. The process in *quare impedit*, is, according to all the books, by summons, attachment, and *distringas*; Com. Dig. *Pleader*, 3, I. 1; the plaintiff has pursued it here with as much regularity as the nature of the circumstances admitted; and by stat. 52 H. 3, c. 12, if the defendant *does not appear, nor cast an *essoïn* on the first distress or before, [*285] there shall be judgment for the plaintiff, and a writ to the bishop.

With respect to the summons, it is laid down in some of the books, that in *quare impedit* the summons may be served on the defendant personally, or at the church door: 1 Brownl. 158; *Searle v. Long*, 2 Mod. 264. But other authorities deny that there shall be any personal service.

Thus in *Vin. Abr. tit. Summons* (A.), it is said, "In *quare impedit* it shall not be to the person." So in 2 Roll. Abr. 486 (*Summons*), "*En quare impedit ne serra al person*," and 11 H. 6, 4, is cited.

But here the return, *non est inventus*, is strictly true. The defendant was constantly resident at Hoxton in Middlesex, and it would have been irregular to have served him there before a *testatum distringas* had been issued upon the *distringas* into Kent. In *Bloxam v. Surtees*, 4 East, 162, a *testatum* summons was mentioned, but Lord Ellenborough observed, that no instance was suggested of any such course of a *testatum* summons into another county, after an original summons in that in which the action was commenced. As to the case of *Searle v. Long*, 1 Mod. 248, S. C. 2 Mod. 264, it appears that, in that case, there were no real summoners, but the fictitious names of John Doe and Richard Roe, and the defendant swore that he had not been summoned, and did not know any such persons as John Doe and Richard Roe. And there the defendant *might* have been summoned. Here there are real summoners; and there being no church in the parish, the plaintiff was excused from making proclamation at the church door.

In *Vin. Abr. (Summons)*, C. 3, upon the stat. 31 Eliz. c. 3, s. 2, which, for *286] the avoiding of secret summons in real actions, requires proclamation on a Sunday at the church door; it is said in the notes, "But if there be no church in the parish, the summons by the common law is sufficient; for it was not the intent to have summons at the church where there was no church;" *Anders.* 278, pl. 286, is cited. Besides, the defendant's committee's attorney having received notice of the summons so long ago as August 1828, it was now too late to come to the Court with technical objections.

Supposing the summons to have been sufficient, or objections to it waived under the circumstances, no appearance was necessary. By the statute, 52 Hen. 3, c. 12, tit. *Days given in Dover, Assize of Darreine Presentment and Quare Impedit*, it is enacted, "And in a plea of *quare impedit*, if the disturber come not at the first day that he is summoned, nor cast an *essoin*, then he shall be attached for another day; at which day if he come not, nor cast an *essoin*, he shall be distrained by the great distress above given. And if he come not, then by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the plaintiff, saving to the disturber his right at another time when he will sue therefore." And Lord Coke, in his reading upon this statute, expressly applies its operation to a case like the present. He says, "put the case, that upon the summons the defendant is returned *nihil*, and at the attachment and distress *nihil* also; this case is out of the letter of the statute, because the defendant was never summoned, but it is said, that when there be two mischiefs at the common law, and the lesser is provided for by express words, the greater shall be included within the same remedy. And this case, where *nihil* is returned, is the greater mischief, for he (the defendant) by his default shall lose nothing; but in the case provided, the *287] defendant by his default shall lose issues, and the law *intends that he will rather appear than lose issues." 2 Inst. 124. Therefore Lord Coke concludes that the statute applies to a case where *nihil*s are returned; i. e. where *nihil*s are properly returned according to the truth of the fact, as here, as well as to a case where the defendant has been summoned. And so in *Com. Dig. (Pleader, 3 I. 1; proceedings in quare impedit)* where it is said, that by this statute of Marlbridge, if the defendant does not appear or cast an *essoin* on the first distress, or before, there shall be judgment for the plaintiff, and a writ to the bishop, though upon the summons or *pone* the defendant was not summoned, but *nihil* returned. The statute 7 & 8 G. 4, c. 71, s. 5, applies only to transitory actions: at all events, it would be completely nugatory as applicable to an action like the present, as the plaintiff is compelled to proceed in the county in which the church is situate, and will be stopped in his proceedings unless the defendant has a dwelling-house or place of abode in that county. And upon a similar provision in a former statute, 51 G. 3, c. 124 (continued by 57 G. 3, c. 101), a learned writer expresses an opinion that it did not operate to prevent the plaintiff from issuing a *distringas*, and availing himself of the statute of Marlbridge, 1 Rosc. 155. The notice, therefore, given by the

plaintiff under 7 & 8 G. 4, c. 71, ought not to prejudice his case; it was unnecessary, and given in mistake.

Wilde and Adams, Serjts., in support of the rule. Instead of ordering *nilil* to be returned upon the *distringas* into Kent, the plaintiff should have taken the profits of the church under the great distress; and at all events the attachment into Kent was irregular in *reciting that the defendant had been summoned, when *nilil* had been returned to the writ of summons. [*288

Cur. adv. vult.

TINDAL, C. J. This was a motion for setting aside a judgment which has been signed for the plaintiff in *quare impedit*, upon the ground of irregularity; and the irregularity complained of is, that the defendant was never served with the summons, and that no part of the subsequent process has been duly executed.

The process upon a *quare impedit* is given by the statute of Marlbridge, 52 Hen. 3, c. 12, in the terms following:—"And in a plea of *quare impedit*, if the disturber comes not at the first day that he is summoned, nor cast no *essoin*, then he shall be attached at another day; at which day if he come not nor cast no *essoin*, then he shall be distrained by the great distress above given; and if he come not then, by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the plaintiff," &c.

And the form of this writ of grand distress appears in the 2 Inst. 254, in Lord Coke's reading on the statute of Westminster the first, where he observes somewhat quaintly, grand distress, *districtio magna*, is so called, not from the quantity, for it is very short, but for the quality, for the extent is very great, for thereby the sheriff is commanded "*quod distringat tenementa, ita quod ipse, nec aliquis per ipsum, ad ea manum apponet, donec habuerit aliud præceptum, et quod de exitibus eorundem nobis respondeat et quod habeat corpus ejus,*" &c.

Whilst, therefore, the statute, by substituting the process by grand distress, and a peremptory judgment on default of appearance, instead of the ancient process of distress infinite, which only went to compel *appearance, but gave the plaintiff no judgment, did on the one hand materially benefit [*289 the plaintiff, "the distress infinite being mischievous," as Lord Coke says, "in respect of the lapse," it cannot but be seen, that it intended on the other hand to secure to the defendant legal notice of the action, by the due execution of the substituted writ.

Even in personal actions, no judgment could be signed against the defendant for default of appearance at common law. And the statute 12 G. 1, which enables the plaintiff to appear for him, in order to proceed to judgment, expressly provides, that there shall first be an affidavit of the service of the process. If then such proof of notice was necessary in personal actions before a judgment by default was allowed, we may safely infer that the statute of Marlbridge contemplated an equal certainty of notice, and intended that the grand distress should be a writ actually executed according to its purport and directions.

And accordingly, in the case of *Searle v. Long*, where the defendant had appeared once on the summons and cast an *essoin*, but afterwards had neither been summoned on the attachment or the great distress, but nominal summonses had been returned on the process; the Court set aside a judgment by default, on the ground that the process had not been executed as the statute intended; observing, that the issue of that process is so fatal, that the right of the party is concluded by it, and that they ought not to suffer it to be changed to a thing of course.

Now, the process which has been sued out in the present case is a summons, an attachment, a process of grand distress into Kent, and a *testatum* grand distress into Middlesex.

The summons is returned *nilil*, and admitting, according to the doctrine cited from the 2 Inst., that *an attachment may nevertheless be grounded thereon, the attachment should at least make a true recital of the return of [*290 the summons: whereas, in this case, after the return of *nilil* has appeared upon

the record, the attachment recites, that the defendant had been summoned to appear on the morrow of All Soule.

This alone would be a sufficient irregularity in a process of this description to call upon us to set it aside.

The attachment is then returned *nihil*; and the grand distress, although it is sued in the usual form, is so far from being intended as any real proceeding, that the plaintiff's attorney himself treats it as a mere matter of form, and by his direction the sheriff makes the return of *nulla bona* thereon; and the *testatum* by which the sheriff is required to distrain the defendant by all his goods, lands and chattels, and to keep them until a further writ issues, and to have his body, is thought to be satisfied by a return, that the sheriff has distrained him by issues merely nominal. Indeed the plaintiff's attorney treats this second writ as merely formal, as he directs the sheriff to levy 40s. thereon.

We think, therefore, that the process of the Court has neither been regularly issued, nor properly executed; and, although the defendant's legal advisers had knowledge of the proceedings, as they had in the case above referred to, yet they never had that legal notice which the statute of Marlbridge intended, when it substituted for the dilatory process of distress infinite, the speedy, and effectual process of the grand distress and final judgment in default of appearance; and for these reasons we think the rule should be made absolute.

Rule absolute.

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*WILMER v. WHITE. Nov. 24.

An insolvent is not exonerated from damages unascertained at the time of his discharge, although the action in which they are sought to be recovered was commenced, and judgment by default suffered, prior to his first imprisonment.

JUDGMENT had been signed against the defendant in *replevin*, for want of an avowry, and on the 28th of April last the plaintiff's attorney delivered the defendant a bill of costs of 28l. 7s. 8d. On the 29th the defendant was committed to prison by another creditor, when he petitioned the Insolvent Debtors' Court for his discharge, and inserted in his schedule the plaintiff as his creditor for 28l. 7s. 8d., of which the plaintiff had due notice.

The defendant was discharged under the insolvent debtors' act in June. But on the 10th of October the plaintiff served him with notice of a writ of inquiry to assess the damages in this action; and on the 14th of November executed a writ of *fi. fa.* for those damages on the defendant's goods, under which he took among other things the articles excepted by the insolvent debtors' act. Whereupon,

Merewether, Serjt., obtained a rule *nisi* to set aside this execution as irregular, after the defendant's discharge under the insolvent debtors' act.

Wilde, Serjt., showed cause.

The act discharges the insolvent only from debts due at the time of his first imprisonment, at which time the defendant was liable to the plaintiff, not for a debt, but for unliquidated damages, the amount of which could not be known, and, therefore, could not be specified in the schedule. With respect to the sort *292] of claims from which the insolvent is to be discharged, the language of former acts has been nearly the same as the present; and it has always been holden that the insolvent is not discharged from a claim for unliquidated damages. In *Hilton v. Worrall*, 2 Chitt. 448, it was held, that a debt depending upon a contingency at the time of a party's discharge under insolvent act 18 G. 3, c. 52, was not thereby discharged. In *Lloyd v. Neele*, Id. 222, it was holden, that discharge under the insolvent debtors' act 53 G. 3, c. 102, does not bar an action of trespass where the cause of action arose before the insolvent went to prison, and the damages were unliquidated before the discharge; and in *Lloyd v. Peell*, 3 B. & A. 407, it was holden, that a plea of

discharge under the insolvent debtors' act is no bar to an action of trespass for *mesne* profits, even though accruing before the discharge.

Merevether. The damages awarded to the plaintiff in replevin are merely nominal, and the precise amount of the costs were ascertained by the admission of the plaintiff's attorney before the defendant went to prison. His schedule, therefore, contained a sufficiently precise statement of the plaintiff's claim against him.

But the present insolvent debtors' act seems to include liabilities such as damages to be ascertained under a judgment: for though the word debt is used in the sixty-first section, yet the insolvent is to confess a judgment under which execution may be issued against his subsequently acquired property, till all claims against him be satisfied: this continuing process, which forms no part of the machinery of the former acts, indicates that it was the intention of the legislature to discharge the insolvent from any claim capable of being ascertained at the time of his discharge, and the *cases decided under former [*293 acts have no application to the present.

TINDAL, C. J. It appears to me that this rule must be discharged. It has been obtained under the sixty-first section of the last insolvent debtors' act, 7 G. 4, c. 57. The words of the section are, "That after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of *feri facias* or *elegit* shall issue on any judgment obtained against such prisoner, for any debt or sum of money, with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act." And the question is, whether the plaintiff's claim be a debt or sum of money, in respect of which an insolvent is entitled to the benefit of this act. Now the act is confined in terms to debts due from the insolvent at the time of his first imprisonment. But at that time no debt was due from this insolvent to the plaintiff; a liability only existed to a claim for unascertained damages. There are no words in the act which can be applied to such a liability under a suit pending at the time of the insolvent's first imprisonment; on the contrary, he is required to insert in his schedule the precise sum due from him to his creditor; a thing impossible where the damages are unascertained.

Rule discharged.

*DELAFIELD, Assignee of DAVID JONES, an Insolvent, v. FREEMAN. Nov. 25.(a) [*294

1. In an action by the assignee of an insolvent, it is not necessary to prove his petition to the Insolvent Debtors' Court, as part of the assignee's title.
2. The insolvent is an incompetent witness for the assignee, although he be willing to release the surplus of his effects.

CASE against the defendant for so negligently and unskilfully preparing a lease, that the insolvent, David Jones, thereby failed to obtain property which he would have obtained if the lease had been properly prepared.

Plea, general issue.

At the trial before Tindal, C. J., the plaintiff gave in evidence the order of the Insolvent Debtors' Court, discharging the insolvent, together with certified copies on parchment, under the seal of the Insolvent Debtors' Court, of the assignment to the provisional assignee, and of the assignment from the provisional assignee to the plaintiff.

This was objected to as insufficient, on the ground, that the Insolvent Debtors' Court had jurisdiction only by the filing of the insolvent's petition, and that, therefore, at least the filing of such petition ought to be shown.

The insolvent was then called, but was objected to as incompetent, although

(a) Communicated by a gentleman at the bar.

he offered to release his interest in the surplus of his effects. It was contended, that his future effects would be liable under the judgment entered up against him in the Insolvent Debtors' Court, and that, therefore, he had an interest in lowering the amount to be recovered under that judgment: whereupon he was rejected, and the plaintiff was nonsuited.

Taddy, Serjt., moved for a rule *nisi* to set aside this nonsuit, on the ground that the evidence put in was *sufficient proof of the plaintiff's title, and that the
 *295] insolvent was a competent witness. With respect to the conveyance to the assignee, he relied on the language of the nineteenth section of 7 G. 4, c. 57, by which it is enacted, "That it shall and may be lawful for the said Court, at any time after the filing of the petition of any such prisoner as aforesaid, as to the said Court shall seem expedient, to appoint a proper person or persons, being a creditor or creditors of such prisoner, to be assignee or assignees of the estate and effects of such prisoner, for the purposes of this act; and when such assignee or assignees shall have signified to the said Court his or their acceptance of the said appointment, the estates, effects, rights, and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately be conveyed and assigned by such provisional assignee to the said assignee or assignees, in trust for the benefit of such assignee or assignees, and the rest of the creditors of such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this act; and after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be to all intents and purposes as effectually and legally vested by relation in such assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him and them: provided, nevertheless, that no act done under or by virtue of such first conveyance and assignment, shall be thereby rendered void or defeated, but shall remain as valid as if no such relation had taken place: and that every such conveyance and assignment as aforesaid to such provisional assignee, and a counterpart of every such conveyance and assignment by such provisional assignee to such other assignee or assignees, shall be filed of record of the said Court; and a copy of any such record, made upon
 *296] parchment, and purporting to have *the certificate of the provisional assignee of the said Court or his deputy, appointed for that purpose, endorsed thereon, and to be sealed with the seal of the said Court, shall be recognised and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all Courts, and before commissioners of bankrupts and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the said Court, in the matter of such prisoner's petition."

Even if it were necessary to show the insolvent's petition, the recital of it in the conveyance was sufficient.

Then, the insolvent was a competent witness, because, if his estate paid all demands, the judgment would not affect him; if it did not, the sum recovered in this action would not render his situation worse, unless it were precisely the sum that turned the scale between paying all, or paying all minus the plaintiff's demand, in which case that circumstance ought to be shown by the party who objected to his competency.

The Court granted a rule *nisi* on the first ground, but refused it on the last.

Wilde and Jones, Serjts., now showed cause. The distinguishing difference between courts of general and courts of special or limited jurisdiction, is, that the jurisdiction of the latter must be shown in order to lay a foundation for their interference, for they are without jurisdiction, unless they act strictly in pursuance of the authority assigned to them: *Brown v. Compton*, 8 T. R. 424. Unless a petition be filed with a proper schedule by the insolvent, the Insolvent
 *297] Debtors' Court has no *authority to order a conveyance; it is a condition precedent therefore, to any claim under such conveyance, that the previous steps be shown to have been duly attended to: and though the language of the

nineteenth section be very general, yet, it is plain from the seventy-sixth section, that the legislature contemplated the necessity of proving the previous steps in the matter, because by that section the officer of the Court is required, upon receiving a fee, to provide a copy of the petition and schedule, as well as of the order of the Court. The only object of the nineteenth section was to render unnecessary any proof of the assignment itself other than the seal of the Court.

The learned Serjeants then contended, that a failure by the insolvent to obtain property, occasioned by the negligence of the defendant, could not be the subject of an action by the assignee of the insolvent, the act of parliament transferring to the assignee only the insolvent's property, and not his right to damages for a supposed tort. Upon this, however, the Court gave no opinion, as the plaintiff's rule sought only to set aside the nonsuit, and, therefore, the argument on the point is omitted here.

TINDAL, C. J. I have listened with great attention to the argument on the nineteenth section of the act, but have not been able to give it any other construction, than that it dispenses with all proof of the title and character of the assignee, beyond that which was given in this cause. If the clause had stopped at the words, "a copy of any such record"—"sealed with the seal of the said court, shall be recognised and received as sufficient evidence of such conveyance and assignment;" it might perhaps have been, as contended; but I do not know how we can reject the ensuing words, "without any proof whatever given of the same, *or of any other proceeding in the said court, in the matter of such prisoner's petition." These words give a wider scope [*298 than the former, and if they had been brought to my attention at *nisi prius* I should have come to the same conclusion as I do now. As to the question, whether or not this action lies for the assignee, the cause is not ripe for that discussion, the present being a motion to set aside a nonsuit; we, therefore, abstain from expressing any opinion on the subject.

PARK, J. I am of the same opinion. It is unnecessary to discuss whether or not the Insolvent Debtors' Court be a court of record, or a court of special or limited jurisdiction, because the words of the act are imperative on us, and give a complete proof of the assignees' title under the assignment; that is, of their title to sue; as the proof is expressly declared to be sufficient for all courts.

BURROUGH, J., concurred.

GASELEE, J. The seventy-sixth section does not appear to me at all to abate the force of the nineteenth. Many cases may arise as to the other proceedings in the Insolvent Debtors' Court, without calling into doubt the validity of the assignment.

Rule absolute.

*WILLIAMSON v. HENLEY. Nov. 26.

[*299]

Declaration, that plaintiff, at the request of defendant, and upon defendant's undertaking to indemnify, defended an action for the recovery of money in which defendant claimed an interest; that judgment was given against plaintiff for 42*l*.; and that he was imprisoned, and paid the money under a *ca. sa.*:

Held, that he might recover against defendant this sum under this count, upon proof of the judgment, without proof of the *captias*: or even on a count for money paid to defendant's use; the defendant having taken out a summons to be permitted to pay such sum in discharge of plaintiff's demand.

Held, also, that the above special count did not disclose a contract void on account of maintenance.

THE first count of the declaration stated, that theretofore and before the making of the promise and undertaking of the defendant thereafter next mentioned, a certain person, to wit, one George Yeoman had deposited in the hands of the plaintiff a large sum of foreign money of great value, to wit, of the value of 42*l*. of

lawful money of Great Britain, to wit, at London : that afterwards and before the making of the promise and undertaking of the defendant thereafter next mentioned, the plaintiff, at the special instance and request of the defendant, had delivered to him, the defendant, the said sum of money of the said George Yeoman, to wit, at, &c. : that before the time of the making of the promise and undertaking of the defendant thereafter next mentioned, the said George Yeoman had threatened to commence an action at law against him the plaintiff, for the recovery of the said sum of money, to wit, at London aforesaid ; and thereupon afterwards, to wit, on, &c., at, &c., in consideration that the plaintiff, at the special instance and request of the defendant, would defend any action which the said George Yeoman should commence against him for or on account of the said sum of money, the defendant undertook, and then and there faithfully promised the plaintiff to save him harmless from the consequences of the said action, to wit, at, &c. : that the said George Yeoman afterwards and before *300] the commencement of this suit, *to wit, on, &c., at, &c., did bring, commence, and prosecute an action against him the said plaintiff, in the Court of King's Bench at Westminster, for the recovery of the said sum of money, whereof the defendant then and there had notice ; and although the plaintiff did, with the privity and consent of the defendant, and to the best of his ability and power, defend the said action or suit, yet such proceedings were afterwards had in the said suit, to wit, at, &c., that the said George Yeoman afterwards and before the exhibiting the bill of the plaintiff, to wit, in Easter term, in the ninth year of the reign of our lord the now king, in and by the consideration and judgment of the said Court, recovered and obtained against the plaintiff, in the said Court in the aforesaid action, at the suit of him the said George Yeoman, damages to a large amount, to wit, the amount of 42*l.* 15*s.*, to wit, at, &c. : that afterwards, to wit, on, &c., a certain writ of our said lord the king, called a *capias ad satisfaciendum*, issued out of the said Court of King's Bench upon the said judgment, directed to the sheriffs of London, by which said writ our said lord the king commanded the said sheriffs that they should take the said plaintiff if he should be found in their bailiwick, and him safely keep, so as that the said sheriffs might have his body before our lord the king at Westminster on Friday next after the morrow of the Holy Trinity, to satisfy the said George Yeoman the damage aforesaid in form aforesaid recovered ; and that the said sheriffs should then have there that writ : that afterwards, to wit, on, &c., the plaintiff was taken and arrested by his body under and by virtue of the said writ of *capias ad satisfaciendum*, at the suit of the said George Yeoman, and was kept and detained in custody and imprisoned at his suit, under and by virtue of the said writ, for a long space of time, to wit, from thence until *801] the 6th day of June, in the year last aforesaid, when *the plaintiff, in order to procure his discharge from the said imprisonment, was forced and obliged, and did necessarily expend divers large sums of money, to wit, the sum of 42*l.* 15*s.* so recovered by the said George Yeoman as aforesaid ; and also the sum of 10*l.* for poundage and officers' fees and other expenses. And the plaintiff was also, by means of the premises, put to other great charges and expenses of his moneys, amounting to a large sum, to wit, to the sum of 50*l.*, and was imprisoned during all the time aforesaid, and thereby during all that time was prevented from following his necessary business and affairs, and lost, and was deprived of an opportunity of going upon a certain voyage, to wit, a voyage to the West Indies and back, and lost divers great gains which he might and otherwise would have made thereby, amounting to a large sum, to wit, the sum of 200*l.*, and was and is by means of the premises otherwise greatly damaged, &c.

There was another special count varying the statement of the same cause of action ; a count for money paid, and the other common money counts. The defendant pleaded the general issue. At the trial before Tindal, C. J., London sittings after Trinity term, the plaintiff proved the judgment in the actions of *Yeoman v. Williamson*, and called a sheriff's officer, who stated that he took the

ested in the result of the cause. His testimony, however, was admitted, subject to a motion on the point in the present term, and on that testimony the defendant Fourdrinier had a verdict. Whereupon,

Spankie, Serjt., moved for a new trial, on the ground that Moses Almosninos ought to have been excluded as an incompetent witness.

*In *Moody v. King and Porter*, 2 B. & C. 558, the plaintiff, who had accepted, and paid for their accommodation, a bill drawn by the two de- [*307
fendants, sued them for money lent; and a *nolle prosequi* having been entered as to Porter, who in the interval had become a bankrupt, he was permitted to be a witness for King, to prove that the bill had been accepted for the accommodation of him, Porter, alone; but this was permitted expressly on the ground, that they were not in partnership when the bill was drawn; that King, therefore, was only a surety for Porter, and as such might have proved under Porter's bankruptcy.

Now here, Fourdrinier having been the general partner of Moses Almosninos, was a joint debtor on the acceptance, and not a mere surety, and could not have proved under a commission against his own partner for a debt incurred by them jointly. *Ex parte Taylor*, 2 Rose, 175, *Ex parte Heath*, Buck. 455, *Ex parte Ellis*, 2 Glynn & J. 312. Fourdrinier's claim against Moses Almosninos, therefore, for his share of the debt to be paid in this action, if not for the costs, would not have been barred by the certificate, and consequently, the witness had an interest in defeating the action.

A rule *nisi* having been granted,

Wilde and Russell, Serjts., showed cause. They urged, that though Fourdrinier could not prove in competition with the creditors of the firm, he might prove the sum paid in this action against Moses Almosninos' separate estate; and even if it were otherwise, no action would lie for Fourdrinier against Moses Almosninos, for any portion of the sum to be recovered in this action. The plaintiff having entered a *nolle prosequi* as to Moses Almosninos, he was no longer under any legal liability; and Fourdrinier, therefore, could never allege in an action for money *paid, that the money had been to the use or at the request of [*308
Moses Almosninos.

Spankie. If there were any weight in the last argument, it might have been adopted by all bankrupts who, previously to the 49 G. 3, c. 121, were called on, after pleading their certificate to a demand made by the principal debtor, to satisfy their surety for the sum paid by him; and yet, till the surety was enabled by the 49 G. 3 to prove his debt, the bankrupt was always holden liable to him: *Wright v. Hunter*, 1 East, 20. The word partner would have been employed in the statute, if it had been intended that he should prove in the same way as a surety; and from the case of *Moody v. King*, it must be inferred the Court thought a partner could not prove. *Cur. adv. vult.*

TINDAL, C. J. The only question in this case is, whether Fourdrinier, upon payment of the whole debt, would be entitled to sue Moses Almosninos, his partner, for contribution, either in law or equity; for if Fourdrinier had this right, he could not call his partner as a witness, it being his direct interest to defeat the action. Before the statute 49 G. 3, c. 121, s. 8, it is clear that the solvent partner, who paid a partnership debt after the date of a commission of bankruptcy issued against his partner, might recover the proportion of such debt by an action at law against the bankrupt, and that his certificate would be no bar to such an action. *Wright v. Hunter*. The only question is, Whether since that statute the solvent partner, after payment of the partnership debt, though subsequently to the commission, becomes entitled to prove? for if he can prove, he is *obliged to prove; the certificate will be a bar to any action for [*309
contribution; and the bankrupt partner is an admissible witness.

And upon consideration of that act, and of the cases decided thereon, we think Fourdrinier, after payment of this joint debt, would be allowed to prove the share paid by him for his bankrupt partner, and that the bankrupt, having

obtained his certificate, and released his right to any surplus, was, consequently, an admissible witness for the defendant.

The solvent partner, if not properly a surety for his partner's share, because each is originally liable for the whole, yet may, with strict propriety, be called as to the share belonging to his partner, a person liable for the debt of another; and in that character, would be entitled to prove under the commission.

And accordingly in *Ex parte Young*, 2 Rose, B. C. 40, Lord Chancellor Eldon held, that those words were adopted in the statute for the convenient latitude of comprehending all those who could not be strictly considered as sureties, but were responsible for another's debt; and allowed the solvent partner who had paid a debt after the commission, which the bankrupt partner had improperly contracted in the partnership name, to prove against the bankrupt partner's estate. Such proof, indeed, would not be allowed to come in competition with the claims of the partnership creditors: but if the debt can be proved at all the certificate is a bar. And in 4 Madd. Rep. 477, the Vice-Chancellor lays down the rule even more largely, by saying, "It is now settled that a solvent partner winding up the partnership concerns, is, under Sir S. Romilly's act, to be considered as a surety paying the debt after the bankruptcy in respect of his previous liability. Each partner is a principal debtor for his own share, and *310] they are mutually sureties *to the creditors; for the share of each other;" and the case of *Wood v. Dodson*, 2 M. & S. 195, leads to the same conclusion. We think, therefore, the witness was properly admitted, and that the rule *nisi* for setting aside the verdict, and for a new trial, must be discharged. Rule discharged.

WHITE v. TRUSTEES of the BRITISH Museum.

A will of lands subscribed by three witnesses, in the presence and at the request of the testator, is sufficiently attested within the statute of frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was.

THIS was a feigned issue upon the question, whether William White, deceased, did, by a certain paper-writing, purporting to be his last will and testament, demise his freehold estates or not. And, upon the trial, the jury found a special verdict, setting out the paper-writing in question, and finding that the whole of the same, except the names of the witnesses, was in the handwriting of the said W. White: that the said W. White signed the said paper-writing before it was signed by the witnesses, John Hounslow, Mary Bristow, and Thomas Badcock, or either of them: that he died on the 13th May, 1823; that about five months before his death, he requested the said John Hounslow and Mary Bristow to sign their names to the said paper-writing, and they respectively, in pursuance of such request, did sign the same in the presence of the said W. White, but that they did not see the signature of the said W. White to the said paper-writing, and were not informed by the said W. White, when they so signed the said paper-writing, or at any other time, what was the nature thereof, or the purpose for which he requested them to sign the same; that, about three months before the death of the said W. White, he requested the said Thomas *311] Badcock to sign his name to the said paper-writing, which he immediately did in the presence of the said W. White: that at the time of signing the said paper-writing by the said Thomas Badcock, the said W. White informed him that the said paper-writing was his will. The special verdict then went on to state, that the paper-writing consisted of two sheets of paper produced to the jurors; that the two sheets were in the same room at the times of the respective signatures of the three persons above mentioned; and that William White was of sound and disposing mind and memory at the time he signed the paper, and also at the time the three other persons signed their names as aforesaid.

It appeared from the inspection of the instrument set out in the special verdict. Vol. XIX.—19

dict, that the signature of the three names could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And it appeared that, immediately above the names of the witnesses, there was written in the hands of the testator these words, "In the presence of us as witnesses thereto."

The case, after having been argued once, was sent down again for a more precise finding of the facts; and the foregoing special verdict having been found, was argued again in Trinity term last.

Wilde, Serjt. The execution of this will is sufficiently in compliance with the requisitions of 29 Car. 2, c. 3, s. 5, which prescribes that such an instrument shall be in writing; signed by the party devising, or by some other person in his presence, and by his express directions; and attested and subscribed in the presence of the devisor, by three or four credible witnesses. On the two first heads the special verdict leaves no doubt. It is undeniable, also, that this will was subscribed by *three witnesses, in the presence of the devisor, and the only question is, Whether the subscription of the witnesses, under [*312 such circumstances, be also attestation within the meaning of the statute? Now, it is not required by the statute that the witnesses should see the devisor sign, or that he should sign in their presence: *Grayson v. Atkinson*, 2 Ves. 454, *Ellis v. Smith*, 1 Ves. jun. 11: nor that all the witnesses should subscribe in the presence of each other: *Jones v. Lake*, 2 Atk. 176 n.(a): nor that they should know the instrument they have subscribed to be a will. [TINDAL, C. J. If the will be not actually signed by the devisor in the presence of the witnesses, must it not be acknowledged as such to them?] The devisor's desiring the witnesses to subscribe the instrument under the usual formulary of attestation, is a sufficient acknowledgment of his having signed it himself, and intending that the instrument should be effective. There is no other object for which he can be conceived to have required their subscription. Consistently, therefore, with the decisions before referred to, the word *attested*, as employed in the statute in conjunction with *subscribed*, can only mean that the witnesses should so subscribe as to be able at a future time to testify, by a reference to their subscription, the identity of the document subscribed. The object of the statute is, to prevent a false document from being substituted for that placed in their hands by the devisor. The safety of the devisor, and of the parties claiming under the devise, is sufficiently answered, if at any time the witnesses can testify that the document produced with their subscription is the same as that which the devisor has recognised by placing it in their hands for the purpose of obtaining their subscription. In *Peat v. Ougley*, Com. Rep. 196, at the top of the will was *written,— [*313 "signed, sealed, and published as my last will and testament, in the presence of, the same being written here for want of room below;"—this was likewise written by the testator's own hand; and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator, Oliver Earl of Bolingbroke, four years, and about twenty-seven or twenty-eight years ago, he and the other two witnesses were called up in the night and sent for into the earl's chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence, but they did not see any of the writing, nor did the earl tell them it was his will, or say what it was, but he believes this to be the paper, because his name is there, and the names of the other witnesses, and he never witnessed any other deed or paper for the earl. And though the earl did not set his name or seal to the will in their presence, yet he had often seen the earl write, and believed the whole will and codicil to be his handwriting.

Stonehouse v. Evelyn, 3 P. Wms. 252, *Bond v. Seawell*, 3 Burr. 1775, *Wallis v. Wallis*, 4 Burn's Ecol. Law, 127, and *Trimmer v. Jackson*, Ib., were also referred to as authorities in support of the will.

Adams, Serjt., contrd. The question is, Whether the word *attested* in the statute is satisfied by the simple signature of the witnesses; that is, signature unaccompanied with information or knowledge as to the nature of the instrument subscribed. The *subscription* required by the statute being satisfied by *314] the witnesses writing their names, it must be presumed that the legislature had some object in requiring *attestation* as well *as subscription; that object was, that the witnesses should know the paper they signed to be one which has the authority of the testator's signature. By no other means could the end of the statute, the prevention of fraud by the substitution of a false will, be prevented. For without such information, if the witnesses should sign two papers resembling each other, they might afterwards be unable to distinguish them. This is the principle which may be collected from all the cases. In *Grayson v. Atkinson* the Lord Chancellor, in giving judgment said, "It is insisted that the word *attested*, superadded to *subscribed*, imports they shall be witnesses of the very act and *factum* of signing, and that the testator's acknowledging that act to have been done by him, and that it is his handwriting, is not sufficient to enable them to attest: that is, it must be an attestation of the thing itself, not of the acknowledgment. To be sure, it must be an attestation of the thing in some sense; but the question upon this clause, as abstracted from the subsequent, is, if they attest *on the acknowledgment of the testator that it is his handwriting*, Whether that is not an attestation of the act, and whether not to be construed as agreeable to the rules of law and evidence, as all other attestation and signing might be proved? At the time of making that act of parliament, and ever since, if a bond or deed is executed by the person who signs it,—afterwards the witnesses are called in,—and before those witnesses he acknowledges that to be his hand,—that is always considered as an evidence of signing by the person executing, and is an attestation of it by them. It is true, there is some difference between the case of a deed and a will in this respect, because signing is not necessary to a deed, but *sealing* is; and I do not know it was ever held, that acknowledging his sealing without witnesses has been sufficient.

But, notwithstanding, that is the rule of evidence relating to *signing. *315] If it was in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument is attested by witnesses, proving that they were called in, *and that he took that instrument, and said, that was his hand, that would be a sufficient attestation of signing by him. That is the rule of evidence.* Considering the words of the act of parliament, it seems upon the penning of that clause, that *if the testator, having signed the will, did, before those witnesses, declare and acknowledge he had done so, and that was his hand, that might be sufficient within that clause:* for as to the subscribing, that makes no difference in the case; that further circumstance is required by the statute, to make it necessary that they should certify their attestation, all of them in the presence of the testator; therefore is subscription mentioned. Other guards are put by the statute on the execution of a will beside the subscription; as, that it is to be in writing. The testator must do some act materially declaring it to be his will, though no particular form of words is necessary. It is true, there are cases where an instrument sealed, and delivered, and subscribed by the testator has been held sufficient to make it a will; *but there must be some act or declaration importing this to be a solemn act by him to dispose of his estate.*" In *Wallis v. Wallis*, 4 Burn's Eccl. Law, 127, the testator said, "Take notice;" and then took a pen, and, in the presence of all the witnesses, signed and sealed each part of his will, and laid both the parts open and unfolded before them, to subscribe their names as witnesses thereto, which they all did by the direction of the said testator, in his presence and in the presence of each other, he showing them severally where to write their names. *Westbeeche v. Kennedy*, 1 Ves. &

*316] B. 362, and the cases *cited in it, all establish the same principle. In all of them the testator either signed in the presence of the witnesses,

or acknowledged the instrument to be his will. If this be not required, the word *attested* may be erased from the statute.

Here there was an acknowledgment to one of the witnesses; but to hold that sufficient, would be to repeal the statute, which requires that three shall attest; such acknowledgment, or what is tantamount to it, being an inseparable incident of attestation. Consistently with the statement of two of the witnesses in this case, the testator might have signed *after* he had obtained their subscription. In Chancery the depositions of all the three witnesses are required; and though in *Stonehouse v. Evelyn* it is said Mr. Justice Fortescue Aland laid it down, that it is sufficient if one of the three subscribing witnesses swears the testator acknowledged the signing to be his handwriting, yet that must be taken to apply to the practice of the circuit where he said he had ruled it, and where in the ordinary course only one of the three witnesses would be called to establish a *prima facie* case.

Peat v. Ougley is an obscure case, but there the witness never signed any other paper, which was not the case with the present will.

Wilde. In *Ellis v. Smith*, Lord Chancellor Hardwicke said, "To the maxim of Lord Bacon I shall oppose one of Lord Trevor's, that an established opinion is not to be receded from." Now it has been an established opinion that a will subscribed by three witnesses is well executed, although the testator omits to say that it has been signed by him. All that the statute means by subscription and attestation is, that the three witnesses should be able to speak to their own signature. *Provided a witness can do that, it would not invalidate an instrument, if he should say he had forgotten the circumstance of subscribing his name. If the witness can identify his handwriting, the security is as complete as if he could identify the instrument. Whatever may be established by acknowledgment may also be established by facts tantamount to acknowledgment; as a dumb man may acknowledge by signs: and the calling on witnesses to subscribe, is equivalent to an acknowledgment that the instrument to which they are required to set their names is genuine. As to the supposition that the testator might have signed after he called on the witnesses to do so, it is not to be presumed that he meditated a fraud against his own will. If this instrument had been a deed executed under a power expressed in the same terms as the statute, it would have been deemed a sufficient execution under the power. *Peat v. Ougley* is in point. [*317]

Cur. adv. vult.

The judgment of the Court was now delivered by

TINDAL, C. J. (After stating the facts as *ante*), Upon this special verdict, the question is, Whether in the execution of this will, the several requisites contained in the statute of frauds have been duly observed? By the 29 Car. 2, c. 3, s. 5, it is enacted, "That all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of non-effect." And as the special verdict finds that the whole of the paper writing is in the handwriting of W. White, and that he signed it before it was signed by the witnesses, the jurors do find in terms, that there is a devise **in writing*, and that it is signed by the party who makes the devise. [*318]

Again, it is found expressly that the names of the three persons were signed by them upon the paper writing in the presence of the said W. White; that is, in the language of the statute, the writing was subscribed in the presence of the devisor. So that the inquiry is simplified and reduced to this single question, Whether the devise was attested by them within the meaning of the statute?

It has been held in so many cases that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will, is equivalent to an actual signature in their presence, and makes

the attestation and subscription of the witnesses complete. The case of *Ellis v. Smith*, which was decided by Lord Chancellor Hardwicke, assisted by the Master of the Rolls, Sir J. Strange, Lord Chief Justice Willis, and Lord Chief Baron Parker, all persons of high and eminent authority, is express to the latter point.

The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by W. White in their presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will; but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the statute the word attested will have no force whatever, and may be considered as if it had never been inserted.

*319] The question, however, appears to us to be, Whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in words, yet an acknowledgment in fact, by the deviser to the subscribing witnesses, that this instrument was his will? for if by what the deviser has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of *Ellis v. Smith*.

In the execution of wills, as well as that of deeds, the maxim will hold good "*non quod dictum sed quod factum est, inspicitur.*"

Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question, is the very paper-writing which was produced by the testator to the three witnesses. The great object of the direction of the statute, that witnesses shall subscribe in the presence of the deviser, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

In the next place, it appears from the special verdict, that the deviser was conscious himself, that the instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names.

But further, it appears from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever *than simply to make them witnesses to the will.

*320] And, lastly, it appears from the same inspection, that immediately above the names of the witnesses, there was written in the handwriting of the testator, these words, "In the presence of us as witnesses thereto," which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

When, therefore, we find the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and

we do therefore, upon the principle of these decisions, hold the execution of the will in question to be good within the statute. Judgment for defendants

*TUCK and others, Executors of GIBBONS, v. FYSON. Nov. 26. [*321

Where a lessee becomes bankrupt, a surety joined in the lease with him is liable to the lessor for breaches of covenant occurring between the date of the commission, and the delivery up of the lease by the lessee under 6 G. 4, c. 16, s. 75.

COVENANT. The declaration set out a lease of a dwelling-house bearing date May 17, 1823, between Francis Gibbons of the first part, George Grain of the second, and defendant of the third, by which Gibbons, who had a term of thirty years in the premises, demised the house to Grain for nine years from Lady-day, 1823, at a rent of 80*l.* a year, payable half-yearly:

And the said George Grain and the defendant for themselves, jointly and severally, and for their and each of their joint and several heirs, executors, and administrators did by the said indenture covenant, promise, and agree to and with the said Francis Gibbons, his heirs and assigns, that they the said George and the defendant, their executors or administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the said Francis, his heirs and assigns, the said yearly rent or sum of 80*l.* therein-before reserved and made payable on the days and times thereinbefore limited and appointed for payment thereof, according to the true intent and meaning of the said indenture: and also should and would from time to time and at all times during the said term, at their or one of their proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze, and keep all and singular the said messuage or dwelling-house and premises thereby demised, and every part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when and where, and as often as occasion should be or require, and at the end or other sooner *deter- [*322 mination of the said demise should and would peaceably and quietly leave, surrender, and yield up unto the said Francis, his heirs and assigns, the said messuage or dwelling-house and premises in good and substantial plight and condition. And the said defendant did by the said indenture for himself, his heirs, executors, and administrators, further covenant, promise, and agree with and to the said Francis, his heirs and assigns, that he the said defendant, his executors and administrators, should and would from time to time and at all times thereafter *save, defend, keep harmless, and indemnify the said Francis, his heirs and assigns*, of and from all loss, costs, charges, damages, and expenses which he the said Francis, his heirs and assigns, should or might sustain, expend, or be put unto for or by reason of the said George, his executors or administrators, not paying the rent, or not performing, fulfilling, and keeping all and singular the covenants, articles, and agreements therein reserved and contained on his or their parts and behalves to be observed, performed, fulfilled, and kept.

Averment of Gibbon's death, November 18, 1826, and of plaintiffs' appointment to be executors.

Breach, that the said George and the defendant had not, nor had either of them, paid the rent aforesaid for the two last half years of the said term elapsed on the 29th day of September, in the year 1827, or any part thereof; but the same was wholly in arrear and unpaid, contrary to the said covenant of the said defendant in that behalf: and that after the making of the said indenture, to wit, on the 18th day of July, in the year 1827, and from thenceforth until and at the commencement of that suit, to wit, at, &c., the said defendant and the said George suffered and permitted the said messuage, or dwelling-house, and premises to be and continue, and the same were for and during all that

*323] time in every part *thereof, ruinous, prostrate, broken to pieces, fallen down, and in great decay for want of needful and necessary repairing, upholding, supporting, maintaining, and keeping the same, contrary to the said covenant of the said defendant in that behalf; and that by reason of the said George not paying the said rent for the two last half-years of the said term, and suffering the said messuage, or dwelling-house, and premises, to be out of repair as aforesaid, the plaintiffs had sustained and been put to loss and damage to a large amount, to wit, to the amount of 500*l.*, to wit, at, &c.; and the said defendant had not saved, defended, and kept harmless, and indemnified the said plaintiffs from such loss and damage; but had hitherto wholly neglected and refused so to do, contrary to his said covenant in that behalf.

To that declaration the defendant pleaded, that the said George Grain, in the said indenture in the said declaration mentioned, before and at and after the making of the said indenture in the said declaration mentioned, and on the 26th day of May, in the year of our Lord 1827, and from thence continually until the suing out the commission of bankrupt thereafter mentioned, was a hatter, and during all that time did use and exercise the trade of a hatter by way of bargaining, exchanging, bartering, and chevisance, and sought his trade of living by buying and selling, to wit, at, &c.; and the said George Grain so using and exercising the trade of a hatter, and seeking his trade of living as aforesaid, afterwards, to wit, on the 31st day of May, in the year of our Lord 1827 aforesaid, at, &c., became and was indebted to one Edward Womersley, a subject of this realm, in the sum of 80*l.* 11*s.* 6*d.* of lawful money of Great Britain, for a true and just debt due and owing from the said George Grain to the said Edward Womersley; and the said George Grain was then and there also

*324] indebted to one James *Knott, a subject of this realm, in a certain other large sum of money, to wit, the sum of 70*l.* 8*s.* 5*d.* of like lawful money, for a true and just debt due and owing from the said George Grain to the said James Knott; and the said George Grain was then and there also indebted to divers other persons in divers other large sums of money: and the said George Grain being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the trade and business of a hatter, and seeking his trade of living as aforesaid, afterwards, and after making the said indenture in the said declaration mentioned, to wit, on the same day and year last aforesaid, at, &c., the said debts to the said Edward Womersley and the said James Knott, and also the said other debts being then and there due and unpaid and unsatisfied, became and was bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts made and provided; and that thereupon, afterwards, to wit, on the 25th day of June, in the year of our Lord 1827 aforesaid, at, &c., a certain commission of bankruptcy under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster a certain day and year, to wit, the same day and year last aforesaid, grounded upon the said statute, upon the petition of the said Edward Womersley and James Knott, was duly awarded and issued against the said George Grain, directed to certain commissioners therein named; (the commission was here set out), by virtue of which said commission, and by force of the said statute concerning bankrupts, the major part of the said commissioners named in the said commission having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts according to the form of the statute in that case made and provided, and

*325] having then and there entered and *kept a memorandum thereof among the proceedings in the said commission, afterwards, to wit, on the 2d day of July, in the year of our Lord 1827 aforesaid, at, &c., did in due form of law, find that the said George Grain had become bankrupt within the true intent and meaning of the statute made and then in force concerning bankrupts before the date and issuing forth of the said commission, and did then and there declare and adjudge him bankrupt accordingly: that at the time the said George Grain became and was bankrupt as aforesaid, he, the said George Grain, was entitled

to the said lease in the said declaration mentioned, to wit, at, &c., and that the said rent in the said declaration mentioned, and every part thereof (if any such be in arrear) became due and was in arrear and accrued, and also that the committing the said supposed breaches of covenant in the said declaration assigned (if any such there be), was committed and made after the date of the said commission, to wit, on the 1st day of July, in the year of our Lord 1827, to wit, at, &c.: that after the said George Grain became and was bankrupt as aforesaid, to wit, on the 21st day of July, in the year of our Lord 1827, at, &c., in the parish and ward aforesaid, Elliot Taylor and Edward Womersley, being then and there the assignees duly appointed of the estate and effects of the said George Grain as such bankrupt as aforesaid, declined the said lease; of which the said George Grain, so being such bankrupt as aforesaid, afterwards, to wit, on the day and year last aforesaid, at, &c., had notice, and thereupon the said George Grain being such bankrupt as aforesaid, afterwards, and after the death of the said Francis Gibbons, to wit, on the said day and year last aforesaid, at, &c., and within fourteen days next after he, the said George Grain, being such bankrupt, had notice that the said assignees had declined the said lease as aforesaid, delivered up such lease to the said plaintiffs *as executors as aforesaid to wit, at, &c. And this the said defendant was ready to verify. [326]

There was a second plea setting forth the same defence more concisely. The plaintiffs replied,

That, by reason of anything in those pleas alleged, they ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because the delivering up of the said lease in the said first plea mentioned, was after the said 21st day of July in the year 1827 aforesaid, and after the said several breaches of covenant and every of them had accrued. And this they were ready to verify. Wherefore, &c.

Demurrer and joinder.

Wilde, Serjt., in support of the demurrer. The defendant is not liable in respect of the breaches of covenant assigned, at all events, not upon this contract. By 6 G. 4, c. 16, s. 75, it is enacted, "That any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained: and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing shall be entitled to apply by petition to the Lord Chancellor, who may order them so to *elect, and deliver up such lease or agreement in case they shall decline the same, and the possession of the premises, or may make such [327] other order therein as he shall think fit."

It is plain that the object of the legislature was, to discharge the bankrupt at all events. Therefore, in *Doe v. Smith*, 5 Taunt. 800, where a lessee covenanted not to assign, and became bankrupt, and his assignees took to the lease, his covenant was holden to be absolutely discharged by 49 G. 3, c. 121, s. 19, and that, therefore, if he came in again as assignee of his assignees, he should not be charged with that covenant, and it was no breach if he assigned.

New the bankrupt would not be absolutely discharged if circuitously responsible through a demand made on his surety. But the delivery up of the lease operates as a surrender and extinguishment of the term by relation, from the date of the commission. It never could have been intended that the lessee should be discharged, and the lessor remain bound by the grant; no one who claimed under it could have any longer a right to enter; and without a power of entry how could he be in a condition to perform covenants? How could he

in case of dispute show any title to the term? It is possible the legislature might not have contemplated the case of a lease with a surety bound by the same instrument; but the instrument must receive the same construction, and be subject to the same incidents, whoever be the party sued. If then the principal lessee be by his bankruptcy discharged from rent accruing after the date of his commission, and if the term be extinguished by the delivery up of the lease, it must be extinguished by relation from the date of the commission, since from that period the lessee is declared to be discharged from all his covenants. It is not contended that a surety for a tenant might not, by some separate instrument,—by a contract in a different form,—be rendered liable in case of the bankruptcy of the tenant; but the defendant being a party to the present lease, and chargeable only in respect of that instrument, his liability cannot be more than co-extensive with it, and the instrument being extinguished by the commission, his liability ceases from the moment of its extinguishment.

Stephen, Serjt., contrd. This case has been virtually decided by *Inglis v. M'Dougal*, 1 B. M. 196. It was there holden, that if a surety enter into a bond with a principal conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt, and be discharged under the 49 G. 3, c. 121, s. 19.

The language of that section is in spirit and almost in words the same as that of the seventy-fifth section of 6 G. 4, c. 16. The discharge of the lessee does not necessarily imply the discharge of his surety, but rather the reverse; for the very object of taking the surety is to secure the landlord against the failure of the lessee; and the argument that the lessee would not be absolutely discharged unless the surety were equally discharged also, was as applicable in *Inglis v. M'Dougal* as in the present case. With regard to the supposed extinguishment of the term by the delivering up the lease, that delivery was required only for the protection of the lessor and lessee, and the statute did not look to the rights of others; but, whether the term be extinguished or not, the lessor is entitled to an indemnity at the hands of the surety if no rent be obtained; and to no more than an indemnity; so that if he were paid by the produce of the land, the surety would not be called on. It is only on the supposition that the legislature intended to discharge the surety, that the argument of an extinguishment of the term by relation to the date of the commission, can be supported at all; and *Inglis v. M'Dougal* has decided that the legislature had no such intention. Admitting even that the term is extinguished by delivery of the lease, there is no ground for contending that it is extinguished retrospectively. It is alleged on this record, and admitted by the demurrer, that damage had accrued, in respect of covenants broken, on the 18th July, 1827: it is not alleged that the assignees had declined to accept the term previously to July 21, 1827; and till they make their election, the effect of the assignment is suspended, and the term vests in the bankrupt: *Copeland v. Stevens*, 1 B. & A. 593, so that, at all events, the defendant is liable till the delivery of the lease within fourteen days subsequently to July 21.

As far as respects the annually-accruing payments, a surety in an annuity-deed is much in the same situation as a surety in a lease; and in *Welsh v. Welsh*, 4 M. & S. 333, it was expressly holden, that in the case of an annuity the surety was not discharged by the bankruptcy and certificate of his principal.

Wilde. Whether the legislature intended to discharge the surety or not, he is at all events discharged by the form of the contract into which he has entered in this case; for the contract being at an end by the delivering up of the lease, so also is his responsibility. And this distinguishes the case from *Inglis v. M'Dougal*, where the responsibility of the surety arose under a separate instrument, a bond, which was not affected by the bankruptcy of the principal. In that case, too, it could not be affirmed that the lease was determined, for there was no lease in existence. Here the lease was determined, and determined by relation from the date of the commission: for from that date

might the lessor have recovered the *mesme profits*, had he been driven to resort to an ejectment.

Cur. adv. vult.

TINDAL, C. J. The question in this case is, Whether a surety for a lessee is liable in respect of breaches of covenant which accrued after the date of a commission of bankruptcy against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under the provision of the bankrupt act 6 G. 4, c. 16, s. 75?

That section contemplates and provides for three cases: first, where the assignees accept the lease; in which case, it declares that the bankrupt shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any non-observance or non-performance of the covenants: secondly, where the assignees decline the same; in which case it declares that the bankrupt shall not be liable as aforesaid, in case he deliver up such lease to the lessor within fourteen days after he shall have had notice that the assignees shall have declined to accept the lease: and, lastly, where the assignees do not, upon request, elect whether they will accept or decline; in which case the Lord Chancellor has power, upon petition, to order the assignees to elect, and to deliver up the lease and possession of the premises if they decline the same.

The present case falls within the second of the provisions contained in the section above referred to; and it may be admitted, that under the circumstances stated in the pleadings, and confessed by the demurrer, the bankrupt himself would not be liable to be sued now for the non-payment of the rent, or non-observance of the covenant to repair stated in the declaration, inasmuch as those breaches accrued subsequently to the date of the commission. But the question still arises, whether the *words of the statute give any more than a personal discharge to the bankrupt, and whether the surety is not still [*331] liable, inasmuch as the breaches were incurred prior to the actual delivery up of the lease to the lessor.

It is contended on the part of the defendant, that when the lessee has delivered up the lease within the time prescribed by the statute, it operates as a surrender of the lease from the date of the commission; so that the term and interest of the lease must be considered to have ceased from that time, and consequently that the surety cannot be held liable for any breaches after the commission, the same being breaches after the term has ceased.

We think, however, the doctrine of a surrender by relation cannot be supported by any legal analogy, or by the proper construction of the statute.

It is well settled by the case of *Copeland v. Stevens*, that where the assignees do nothing to show their acceptance of a lease for years, the effect of the assignment is suspended, and the term vests in the bankrupt until they make their election. The term, therefore, having once vested in the bankrupt, must remain vested in him, until either the assignees elect to take it, or until he himself delivers it up under the provision of this section; for if it could be deemed to have been divested or extinguished from the date of the commission, it would follow that the bankrupt, if he had been in possession during the interval, would have been so without any title from the time of the commission.

And as to the statute, it contains no words of avoidance of the lease from any antecedent time: it only declares that in case the lessee delivers up the lease, he shall not be liable for the breach of covenants incurred after the date of the commission; and these words appear to us to import no more than a personal discharge to the lessee from his liability under the covenants, by the *per- [*332] formance of a condition subsequent. Inasmuch, however, as the liability of the surety was running at the same time, and there is nothing in the act to extend the defeasance to his case, we think it still continues until the actual delivery of the lease under the statute to the lessor.

In the case of *Inglis v. M'Dougal* the surety was held not to be discharged where the assignee had accepted the lease as part of the bankrupt's estate, though the stat. 49 G. 3 uses words exactly similar to those in question, viz. "that the bankrupt shall not be liable to pay any rent accruing after such

acceptance." And we see no reason to doubt the propriety of that construction, or to place any other upon the words of this act. Upon the whole, therefore, we think judgment should be for the plaintiff.

Judgment for the plaintiff.

FIELDER v. RAY. Nov. 23.

After the plaintiff has proved, by witnesses, a case of implied or oral contract, he cannot be nonsuited by the defendant's producing an unstamped written instrument, purporting to contain the terms of the contract.

THE defendant had engaged with one Aldrich, that Aldrich should print certain quantities of calico.

Shortly after the commencement of the process Aldrich assigned his business and factory to the plaintiff, who proceeded with and completed the work, the value of which he sought to recover in this action. At the trial before Tindal, C. J., the delivery of the goods was proved, and that a great part of the work was done after the plaintiff had succeeded to the premises.

The defendant insisted that his contract was with Aldrich; that he had never retained the plaintiff; to whom, in any event, he could not be liable for more *333] than the portion of work done by him subsequently to the assignment by Aldrich; and further, that he had refused to allow the work to be proceeded with by the plaintiff till he had signed a written agreement containing terms different from those which the plaintiff now sought to enforce. This agreement was produced, but not being stamped, it was objected, on the part of the plaintiff, that it could not be read, and the learned Chief Justice being of that opinion, a verdict was found for the plaintiff.

Wilde, Serjt., obtained a rule nisi to set aside this verdict and enter a nonsuit, on two grounds: first, that without the writing there was no evidence to go to the jury of any contract between the plaintiff and defendant; secondly, that as it appeared the agreement between the parties had been reduced to writing, the plaintiff ought to be nonsuited for not producing it.

Taddy, Serjt., who showed cause, argued, that after the plaintiff had established his case without any suggestion of a written agreement having been made, if the defendant relied on a written agreement he must first put in and prove it; and that having failed to do so, he could not say that the plaintiff had failed in establishing his case, since if the writing had actually been produced, it might turn out not to affect the contract on which the action was brought. He relied on the language of Littledale, J., in *Reed v. Deere*, 7 B. & C. 266, "If, indeed, a plaintiff get through his case without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped;" and on *Rex v. Inhabitants of Rawden*, 8 B. & C. 708, where, upon the trial of an appeal, the appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent *334] and taxes for the same, the respondents, in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness, in cross-examination, having stated that the letting was by a written instrument, the Court held that it could be proved only by the production of that instrument.

Wilde. The evidence on which the plaintiff launched his case not having been the best that could have been produced, ought not to avail him. If he had proved his case by a witness who afterwards had been shown to be interested, the whole of his testimony would have been struck out. In *Reed v. Deere* the objection was not urged in the present form. There a party declared upon two written agreements, by the second of which variations were made in the first; and there were also counts upon each separately; it appeared when the instru-

ments were produced in evidence by the plaintiff, that the first only was stamped; and it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiff could not exclude the second agreement, and proceed upon the counts, setting out the first only. And *Rex v. Inhabitants of Rawden* was a decision upon a parish appeal, where the case of the respondents was distinct from the case of the appellants, the respondents relying upon a different contract. But *Vincent v. Cole*, 3 Carr. & P. 481, sustains the present objection. If it appear that the contract upon which both parties are proceeding is evidenced in writing, it makes no difference whether that be shown in an early or late stage of the cause.

TINDAL, C. J. The rule for a new trial on the ground that there was no evidence of a contract to go to the *jury must be discharged. Considering that a great part of the work was done after the plaintiff was in possession of the premises assigned by Aldrich, and that the defendant received the goods, there was at least *some* evidence of a contract to go to the jury. But it has also been urged that a written document which was tendered in evidence on the part of the defendant, and rejected for want of a stamp, ought to have been received, at least for the purpose of nonsuiting the plaintiff, on the ground that he had established by testimony a contract of which there was evidence in writing. [*335]

I think, however, that it was incumbent on the defendant in that stage of the cause to prove the existence of the agreement, by producing it in a form in which it could be received, that is, properly stamped. It has been argued, that if it be shown that a contract is evidenced by writing, it is immaterial whether this appear on cross-examination of the plaintiff's witnesses or in the course of the defendant's evidence. But there is this difference in the case: that if it appear by the testimony of the plaintiff's witness, the absence of the writing is an inherent defect in his cause which it is incumbent on him to get over; whereas if it appears from the defendant's witness, it is an objection which the defendant must substantiate by the production of the instrument in the regular way: otherwise this inconvenience might follow,—that the plaintiff might, on a mere assertion of the defendant, be nonsuited for the non-production of a written instrument, which if it had been produced might turn out not to apply to the contract in question. And the decided cases establish this distinction. The opinion expressed by Littledale, J., in *Reed v. Deere*, was confirmed in *Rex v. Inhabitants of Rawden*,—where upon the trial of an appeal, the appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in *order to show that the pauper was not the sole tenant, attempted to prove by parol [*336] that the premises were let to the pauper and two other persons; but the witness, on cross-examination, having stated that the letting was by a written instrument, it was held that it could be proved only by the production of that instrument:—and in *Stephens v. Pinney*, 8 Taunt. 327: there, in an action on the common counts for work and labour, it was held that the plaintiff, having established his case by other evidence, was not precluded from recovering, by the defendant's proving the existence of an unstamped and unsigned agreement, which fixed the price, and which the defendant did not give notice to the plaintiff to produce. That case in substance and effect agrees with the present. We cannot see judicially, that this instrument is in existence unless it be produced properly stamped.

However, as it would be hard on the party not to allow him an opportunity of producing the instrument, we think the rule for a new trial should on this ground be made absolute on payment of costs.

PARK, J. I concur in thinking that there was evidence of a contract to go to the jury. As to the rejection of the unstamped instrument produced by the defendant, none of the cases have laid down a rule contrary to that which has been acted on here. *Vincent v. Cole* is quite consistent with our present decision, because there, it appearing in the plaintiff's case, that the agreement had

been reduced to writing, Lord Tenterden held that he must be nonsuited, unless the writing were produced. In *Strother v. Barr*, 5 Bingh. 144, I said "that parol evidence of the contents of a written instrument cannot be given where the contract contained in such instrument is the subject of *337] the suit; because *the terms of the agreement must depend on the written instrument:" and Lord Tenterden has laid it down, that a Judge has no right to inspect such an instrument, unless it be produced in the regular way; otherwise he might be involved in great difficulties.

In *Doe d. Wood v. Morris*, 12 East, 237, where, in ejectment, the landlord proved payment of rent by the defendant, and half a year's notice to quit given to him, it was held he could not be turned round by his witness proving on cross-examination that an agreement relative to the land in question was produced at a former meeting between the same parties, and was on the morning of the then trial seen in the hands of the plaintiff's attorney, the contents of which the witness did not know, no notice having been given by the defendant to produce that paper; for though it might be an agreement relative to the land, it might not affect the matter in judgment, nor even have been made between those parties. That was a stronger case than the present, because the fact came out on cross-examination. But *Stephens v. Pinney* is exactly in point. There, in an action on the common counts for work and labour, it was held that the plaintiff, having established his case by other evidence, was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement, which fixed the price, and which the defendant did not give notice to the plaintiff to produce: this concurs with what was said by Littledale, J., in *Reed v. Deere*: and Dallas, J., said, (a) "It is clear, if it had appeared as part of the plaintiff's case, that there was an agreement in writing regulating the price and terms of the work to be performed, he must have produced it; and when produced, it could not have been received in evidence, being unstamped; and the *338] plaintiff *then must have been nonsuited. The plaintiff, however, had made out his case; but it appeared in the course of the evidence of one of the witnesses for the defendant, that there was a written agreement. In proving the existence of the written agreement, it turned out to be unstamped, and, therefore, inadmissible in evidence, and, consequently, not amounting to an agreement. The evidence only goes to show, that a paper, not properly stamped, is in existence." And that was confirmed by the decision in *Rex v. Rawden*. There, upon a trial of an appeal, the appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for the same, the respondents, in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper and two other persons; but the witness on cross-examination having stated that the letting was by a written instrument, the Court held, that it could be proved only by the production of that instrument.

It seems to me, therefore, that this writing coming out of the defendant's hand, and not on cross-examination of the plaintiff's witnesses, was properly rejected by the Chief Justice. There is no ground, therefore, for a new trial, and it can only be granted on payment of costs, to give the defendant the opportunity of producing the instrument in a regular way.

BURROUGH, J. I am of the same opinion. This instrument was part of the defendant's evidence; and when the plaintiff's case has been closed, the defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross-examined the plaintiff's witnesses.

Rule absolute for a new trial on payment of costs.

GASELEE, J., was absent.

(a) In *Stephens v. Pinney*.

*TATLOCK and Others v. SMITH and Others. Nov. 24. [*339]

By an agreement between defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on defendants' business, and paid the creditors 10s. in the pound; they then tendered for execution by defendants a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance: the instrument not having been executed by all the creditors, a meeting at which the defendants were called on to execute was adjourned, that the signature of every creditor might be obtained:

Held, that plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least, till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants.

THIS was an action by the plaintiffs, as drawers, against the defendants, as acceptors of certain bills of exchange.

The defence was an agreement, bearing date October 22, 1827 (subsequent to the acceptance of the bills), by which agreement the plaintiffs and others, creditors of the defendants, who were silk dyers, consented to appoint certain persons trustees, and as managers and directors of the defendants' estate, for the purpose of winding up their trading concerns. This agreement was as follows:—

"Memorandum, that we, the undersigned creditors of Leny Smith and Leny Deighton Smith, of Paternoster Row and of Hackney, crape manufacturers, do hereby, with their consent testified by them and ourselves severally being partners to and signing this memorandum, agree to appoint Robert Dodgson, of Wood Street, Cheapside, silk merchant, Richard Thomas, of Fen Court, London, Gent., and William Jones Brown, silk merchant, to be trustees, managers, and inspectors and directors of their estate and effects for the purpose of winding up and settling their affairs, by the collection, sale, and division of their estate and effects equally amongst us their said several creditors: and we, the undersigned creditors, hereby severally consent and *agree that the said Robert Dodgson, Richard Thomas, and William Jones Brown, shall take a conveyance [*340 and assignment of the estate and effects, and shall receive and pay, direct, and manage in all the said affairs until each creditor shall have received the full payment of our said several debts, the surplus to be paid over to Leny Smith and Leny D. Smith. And it is further agreed, that when sufficient moneys shall be collected and raised from the said estate and effects to pay all the creditors 2s. 6d. in the pound upon their said several debts, the said Robert Dodgson, Richard Thomas, and William Jones Brown shall make and pay such dividend; and so on, a further like dividend of 2s. 6d. in the pound, until the said several creditors shall be paid the whole of their said debts: and the said Leny Smith and Leny Deighton Smith do hereby agree to make the said conveyance and assignment of all their said estate and effects unto the said Robert Dodgson, Richard Thomas, and William Jones Brown, whenever thereunto required; in which said deed is to be inserted all other usual and necessary clauses and conditions. And it is lastly agreed, that this agreement is to be void unless all the creditors whose debts shall amount to 20l. and upwards shall sign the same within fourteen days from this date, as witness the hands of the several parties, this 22d day of October, 1827."

The trustees entered on the management of the business; employed the defendants at a salary to assist them; and by sale of the defendants' stock were enabled to pay, and paid, 10s. in the pound. They then called on the defendants to execute a conveyance of their real property pursuant to the agreement, but the defendants objected to do this unless the conveyance contained what they insisted was a usual and reasonable clause, a general release from the creditors. A meeting of the creditors took place, at which a conveyance was *tendered, with a clause of release which the defendants deemed insuffi- [*341 cient, and therefore refused to execute the conveyance. This deed, such as it was, had not been executed by all the creditors; and the meeting was ad

journed in order that it might be ascertained whether a creditor, whose signature to the instrument was wanting, would now execute it. In the mean time the plaintiffs commenced this action.

The Chief Justice, before whom the cause was tried at the Guildhall sittings after last term, thought that the defendants' objection to execute the conveyance was reasonable; but that, at all events, the action was premature, because, till another meeting of the creditors had been held, and the conveyance, such as it was, had been tendered, signed by all the creditors, it was not certain that the defendants would not have executed it; he therefore directed a nonsuit.

Adams, Serjt., moved for a rule *nisi* to set aside this nonsuit, on the ground that the defendants, by refusing to execute the conveyance of their real property, had rescinded the agreement into which the plaintiffs and the other creditors had entered, and were therefore liable to be sued by them as before. In all the cases in which it has been holden, that after a composition deed the debtor is no longer liable to be sued, there has been either an actual assignment of the whole of the debtor's property, or sureties have been given for part payment, or the creditor has given time. *Fitch v. Sutton*, 5 East, 230, *Steinmann v. Magnus*, 11 East, 390, *Heathcote v. Cruickshanks*, 2 T. R. 24. In cases of actual assignment, the debt has been holden to be extinguished; the giving sureties has been holden a good consideration for forbearance; and the giving time to the *342] principal *has been holden to discharge the sureties. But none of those ingredients occur in the present case. There has been no conveyance of the freehold, nor has there been any reasonable objection to it; for, by agreement, the trustees were to hold the property till it paid 20s. in the pound, when a release would have been unnecessary, and therefore could not have been contemplated. In *Boothbey v. Sowden*, 3 Campb. 174, where a man being embarrassed in his circumstances, all his creditors signed an agreement to give him time for the payment of their respective demands by instalments, and to take his promissory notes for the amount, that agreement was holden binding upon each of them, the signing of the others being a sufficient consideration; and it was decided they could not sue for their original cause of action without proving that the agreement had been broken on the part of the debtor. But in *Cranley v. Hillary*, 2 M. & S. 120, plaintiff, the drawer of a bill of exchange accepted by the defendant, agreed with him and the rest of his creditors to take a composition of 8s. in the pound, to be secured by promissory notes to be given by defendant payable on days certain, and that defendant should assign to the creditors, certain debts, upon which they should execute a general release; the assignment was executed, and all the creditors, except the plaintiff, received their composition and executed the release; the plaintiff might have received his promissory *notes if he had applied for them, but it did not appear that defendant had ever tendered them to the plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange: it was holden, that he was *343] not precluded by the agreement from *recovering. In *Cork v. Saunders*, 1 B. & A. 50, where there was an actual agreement to release, *Holroyd, J.*, said, "The effect, however, of this agreement to release seems to be this; not that the composition should operate immediately as a satisfaction when paid, but that the creditors were then to give a formal release by deed, and that the debtor was not to be discharged until such deed was executed." In *Butler v. Rhodes*, 1 Esp. 236, the debtor executed a deed of assignment of all his property. In *Jolly v. Wallis*, 3 Esp. 228, the creditors accepted of the composition. And in *Thomas v. Courtney*, 1 B. & A. 1, where the creditors of an insolvent agreed, by an instrument (not under seal), that they would accept in full satisfaction of their debts 12s. in the pound, payable by instalments, and would release him from all demands, and one of the creditors who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person, the money due on this bill having

afterwards been paid by the acceptor, it was holden, that the creditor might retain it.

A rule nisi having been granted,

Wilde, Serjt., showed cause. There is no evidence here of a final and absolute refusal to execute the conveyance; but taking it that there is, the clause for a release was a usual clause on which the defendants might reasonably insist. The manifest object of the agreement of October 22, 1827, was to divest the defendants of all their property, in order that it might be applied to the discharge of their debts. That agreement was fairly acted on: possession of the stock in trade was given; the trustees had the management of the concern *and paid 10s. in the pound; and the defendants had no longer any pos- session of the property, except as servants to the trustees. It would be [*344 unjust, if, after they had deprived themselves of their property for the purpose of satisfying their creditors, a creditor who had acted on and received the benefit of that arrangement should have the power of consigning them to a gaol. Lord Ellenborough, C. J., in *Cork v. Saunders*, says, "The plaintiff, by the terms of the agreement, consents that the property of the defendant shall be assigned, and be in the management exclusively of the defendant, under the direction of the trustees, until Michaelmas. How can the plaintiff then replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if all the other parties could have been placed in their original situation; but that it is impossible. This is an anomalous case, in which the plaintiff cannot stand in his former situation; nor can I say at present that the whole shall be nullified." Bayley, J., said, "By the terms of the agreement, it is stipulated that the framing concern should be carried on until Michaelmas for the benefit of the creditors who might concur; and it contains a further stipulation, that the debtor shall assign all his estate *immediately*,—the consequence of which would be, that he would thereby divest himself of all means of payment. It is true that the defendant remains in possession; but as servant only to the trustees: he has not a single article of property which he can appropriate to the payment of his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them: this they neglect to do, and they postpone the period at which they ought to sell. The non-division, however, of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears *to me that their only remedy is in equity." And [*345 Abbott, J. "It is said, that as the trustees did not sell at Michaelmas, the plaintiff may now sue; but how can the debtor get back his effects? I think, therefore, that the circumstance of the plaintiff's not having concurred in postponing the sale does not remit him to his original right of action."

The case of *Cranley v. Hillary* has no bearing on the present, the plaintiff never having received the promissory notes which the defendant was to give in the way of composition.

Adams was heard in support of his rule.

TINDAL, C. J. The ground on which the plaintiffs were nonsuited was, that they were not in a situation to sue, unless they could show that the agreement of 1827 was no longer in force, or had been broken by the defendants. This agreement seems, by its terms, to contemplate a suspension of the right of action on the part of the creditors, and in our judgment that suspension still continues. It begins by stating, that, "the said Robert Dodgson, Richard Thomas, and William Jones Brown shall take a conveyance and assignment of the estate and effects, and shall receive and pay, direct, and manage in all the said affairs until each creditor shall have received the full payment of his said several debts; the surplus to be paid over to Leny Smith and Leny D. Smith: and it is further agreed, that when sufficient moneys shall be collected and raised from the said estate and effects to pay all the creditors 2s. 6d. in the pound upon their said several debts, the said Robert Dodgson, Richard Thomas, and William Jones Brown shall make and pay such dividend; and so on, a further like dividend of

2s. 6d. in the pound, until the said several creditors shall be paid the whole of their said debts." *This of itself implies, that the trustees are to take *346] all the defendants' tangible property for the payment of their debts. They have taken it, and they have made payments to the extent of 10s. in the pound. Is it reasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors? Their situation itself seems to preclude the possibility of any such intentment. The agreement then goes on, "And the said Leny Smith and Leny Deighton Smith do hereby agree to make the said conveyance and assignment of all their said estate and effects, unto the said Robert Dodgson, Richard Thomas, and William Jones Brown, whenever thereunto required; and in which said deed is to be inserted all other usual and necessary clauses and conditions." I do not say that an absolute refusal to execute the conveyance as it stood might not have remitted the creditors to their rights; but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of *any* release. One of the creditors was absent at the time the deed was produced, and the business stood over till he should have been consulted on it. The rule, therefore, must be discharged.

PARK, J. Our decision is consistent with all the previous cases. On the face of this agreement certain things are to be done, which plainly imply a suspension of the creditors' right to sue, and there is no evidence of anything having occurred to remit them to their rights.

BURROUGH, J. This is a very plain case. The defendants' property was transferred to trustees, and their debts were partly paid. It has been contended *347] that *there was no consideration for any forbearance to sue; but that is necessarily implied from the nature of the transaction: the creditors were bound by the agreement having been executed in part; and nothing has been done to remit them to their prior rights.

GASELEE, J. This action was at least premature. The meeting at which the terms of the release were discussed was not a final meeting; and consequently there was no proper tender of the release such as it was.

Rule discharged.

REGULÆ GENERALES.

It is ORDERED, that in future, where a rule to plead shall have been entered in or of the term in which, or the vacation succeeding the same, any amendment shall be made in a declaration, no new rule to plead shall be necessary, but the defendant shall plead within four days after the amendment, unless otherwise ordered by the Court or the Judge granting leave for the amendment.

N. C. TINDAL.
J. A. PARK.
J. BURROUGH.
S. GASELEE.

It is ORDERED, that in future, where a rule to show cause is obtained in this Court for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel at *348] *the time of making such rule absolute, shall be stated in the said rule to show cause.

N. C. TINDAL.
J. A. PARK.
J. BURROUGH.
S. GASELEE.

IT IS ORDERED, that in future, when a rule to show cause is obtained in this Court to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to show cause.

N. C. TINDAL.
J. A. PARK.
J. BURROUGH.
S. GASELKE.

MEMORANDA.

IN the course of the last vacation the Hon. Mr. Baron Hullock died, at Abingdon, on the Oxford circuit.

On the 16th November in this term, William Bolland, Esquire, was called to the degree of the Coif, and gave rings with the following motto:—" *Regi, regnoque fidelis*;" and on the same day was appointed one of the Barons of his Majesty's Court of Exchequer, in the room of the late Mr. Baron Hullock, and took his seat accordingly.

END OF MICHAELMAS TERM.

CASES
 ARGUED AND DETERMINED
 IN THE
 COURT OF COMMON PLEAS,
 AND
 OTHER COURTS,
 IN
 Hilary Term,

IN THE TENTH AND ELEVENTH YEARS OF THE REIGN OF GEORGE IV.

FEARN v. LEWIS. Jan. 23.

"Plaintiff's claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, and it is my intention to pay them; but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive:"

Held, not an unqualified acknowledgment from which the Court could imply a sufficient promise to pay to take a case out of the statute of limitations.

To an action on a bill of exchange for 200*l.* the defendant pleaded the statute of limitations.

At the trial before Tindal, C. J., London sittings after last term, the plaintiff, in order to take the case out of the statute, put in the following letters, addressed by the defendant to a friend of the plaintiff in the year 1828:—

"My dear Sir,—I am this day favoured with yours, and feel obliged by the offer of assistance to settle with Mr. *Fearn; and, in the present stage
 *350] of my affairs, I can only say I shall feel much indebted to Mr. Fearn to withdraw his outlawry, and as soon as common decency and my situation will allow, Mr. Fearn's claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, and it has been and is my intention to pay them. I cannot conclude without saying, I must be allowed time to arrange my affairs; and if I am proceeded against, any exertion of mine will be rendered abortive, and the bench or France must be my destination; and any one who reads my father's will, will soon see how I am situated. My best wishes to all your circle, and I am

"Yours, &c.

"W. LEWIS."

"Dear Manning,—I beg leave to apologize for any neglect in regard to answering your kind letter, and I assure you Mr. Matthias was desired to call on you when in town, and to arrange with Mr. Fearn; however, as it now appears he has not done so, allow me to say I am ready and willing to do anything

and everything to satisfy Mr. Fearn and all my creditors; and my only regret is that, by the way my father has left me, I am totally unable to do more than give up (which I do by deed) almost the whole of my income to my creditors, and no man can do more; and if I am put into prison not one penny will my creditors ever receive. For the truth of this, I refer you now to my father's will, and declare to you, so help me God, I am not worth one pound, and this place is mine to live in, but everything is left as heir-looms, and cannot be touched by any process; and if my person is laid hold of I never will put in bail, but surrender. Let me hear from you, and am

"Yours, &c.

"W. LEWIS."

*It did not appear on the record that the defendant had been outlawed in this action, and the plaintiff failing to prove it, the Chief Justice directed a nonsuit, on the ground that as the letters spoke of a claim in which the defendant had been outlawed, there was no evidence to connect the acknowledgment contained in them with the demand made by this action. [*351]

Taddy, Serjt., now moved to set aside this nonsuit and for a new trial. The letters containing a general admission that something was due to the plaintiff, and referring only to a single claim, it was for the defendant to show the affirmative that there were other claims to which the admission might apply, and not for the plaintiff to prove a negative, that there were no other such claims. In *Frost v. Bengough*, 1 Bingh. 266, in an action on a promissory note, the defendant having pleaded the statute of limitations, the plaintiff gave in evidence, as proof of an acknowledgment within six years, the following letter from the defendant to the plaintiff:—"Business calls me to Liverpool. Should I be fortunate in my adventures, you may depend on seeing me in Bristol; otherwise I must arrange matters with you as circumstances will permit." The defendant did not show that there were any other matters besides the promissory note to which the letter could refer. It was held that it was properly left to the jury to decide whether this letter referred to the matter of the promissory note, and was a sufficient acknowledgment to take the case out of the statute. And *Baillie v. Inchiquin*, 1 Esp. 435, is to the same effect. [GASELEE, J. Subsequent decisions have laid it down that, to take a case out of the statute, there must be a promise to pay, as well as an acknowledgment of the debt.] The plaintiff was not nonsuited on that ground; but *in *Tanner v. Smart*, 6 B. & C. 603, [*352] Lord Tenterden laid it down that a promise to pay might be implied from a general acknowledgment if there were nothing to guard or qualify it, as in *A'Court v. Cross*, 3 Bingh. 329, and *Scales v. Jacob*, 3 Bingh. 638.

As to the outlawry not appearing on this record, the action being against a single defendant, the outlawry would not necessarily appear, as it would where one was outlawed in an action against several.

TINDAL, C. J. If upon investigation it shall turn out, on the whole, fruitless to send a case before a second jury, the Court will decline doing so, although the precise objection on which a plaintiff has been nonsuited may not appear tenable. And I think this case ought not to be submitted again to a jury, because the plaintiff has failed to show that the legal operation of the acknowledgment made by the defendant is such as to take the case out of the operation of the statute of limitations.

The question is, whether these letters constitute a distinct and unqualified acknowledgment of an existing debt. Now, the first letter points to a debt on which the defendant had been proceeded against to outlawry, and though this record might not of necessity show whether the defendant had been outlawed or not, yet unless the plaintiff proved that circumstance, his claim would not appear to be one to which the acknowledgment in the letter could apply. But neither of the letters import such a direct and unqualified acknowledgment of a debt as would authorize the Court in implying a promise to pay. They import no more than an offer on the part of the defendant to surrender his income, with a view to an arrangement with his *creditors, provided he be allowed [*353] time to arrange his affairs.

PARK, J. I am of the same opinion, and think the nonsuit right. The letters do not sufficiently appear to apply to the plaintiff's demand; and, at all events, contain no more than a kind of conditional offer to pay.

GASELEE, J. Admitting the rule to be that a promise to pay may be implied from a general and unqualified acknowledgment of a debt; can this be called an unqualified acknowledgment, when the defendant threatens that he will do nothing if the creditors proceed? Rule refused.

HACK'S Fine. Jan. 23.

THE rule of Court requires, that in Scotland, acknowledgments shall be taken before an advocate or writer to the signet.

The deforciant, ten in number, lived at Inverness, 150 miles from Edinburgh, the nearest place where advocates and writers to the signet were to be found, and the property intended to pass was of small value.

The *dedimus* was therefore directed to the attorneys of the sheriff, one of them a magistrate.

Under these circumstances the Court, on the motion of *Bompas*, Serjt., permitted the fine to pass.

*354] *FRENCH v. BROOKES and Another. Jan. 27.

Defendants engaged plaintiff to superintend mines in America for three years, at a salary of 600*l.* per annum, to increase 50*l.* every year, and commence from his leaving England, with a proviso, that plaintiff should not be dismissed without a twelvemonth's notice or a twelvemonth's salary, and the reasonable expenses of his return, and that if he stayed at the mines three years, a sum should be allowed for the expense of the return of his family.

Plaintiff left England in August, 1825, and arrived at the mines in April, 1826.

Defendants dismissed plaintiff in September, 1827, without giving notice, or paying a year's salary, or any expenses of return. In an action for breach of the contract, a verdict having been given with damages to cover a year's salary from the time of dismissal, with leave for the plaintiff to move to increase the damages by 320*l.*, the expense of the return of the plaintiff's family, and 470*l.*, the amount of salary from the end of a year after dismissal to the end of the third year after his arrival at the mines.

Held, that the plaintiff was not entitled to increase the damages by the amount of those sums.

THE defendants, directors of a certain mining company, called the Famatina Mining Company, engaged the plaintiff to superintend their mines under the following agreement.

Articles of agreement entered into, this 27th August, 1825, between John Oliver French, Esq., of the one part, and Henry James Brooke, Esq., and Lieutenant Colonel Rowan, for and on behalf of the Famatina Mining Company on the other part.

The said John Oliver French shall forthwith proceed to Buenos Ayres, and from thence to the mines, and employ himself for the space of three years, to be computed from the date of his arrival at the mines (but determinable, nevertheless, as hereinafter mentioned), in the service of the said company, in the capacity of commissioner or superintendent.

The said John Oliver French shall, while in South America, reside in such places, and remove from time to time to such parts as shall appear to be most conducive to the interests of the said company; he shall devote the whole of his time and attention to the service of the said company, and shall not, during
*355] his continuance in their service, directly or indirectly be engaged in any other transaction, speculation, or undertaking whatsoever.

The said directors shall pay, or cause to be paid, unto the said John Oliver French, as a remuneration for his services, the following salary, that is to say, at the rate of the sum of 600*l.* sterling, from the day of his embarkation

for the first year of his service, with an increase of 50% for each succeeding year of his service.

The said directors shall provide a passage for the said John Oliver French in such vessel as they may think fit to South America, and shall defray the expense of such passage, and of the journey of the said John Oliver French from thence to the mines.

The said John Oliver French shall also be allowed, in addition to his salary, the costs and expenses of journeys made by him on account of the company.

The said directors shall be at liberty to dissolve this agreement any time on giving to the said John Oliver French twelve calendar months' notice in writing or paying to him twelve months' salary in lieu of such notice, and on paying to him a reasonable sum towards defraying his expenses from South America to England, the expenses of his journey from the mines to the port of embarkation to be also paid by the company.

If the said John Oliver French shall faithfully serve the said company for the space of three years from his arrival at the mines, and shall not, at the expiration of such time, continue to serve the said company under any fresh contract, he shall in like manner be entitled to a reasonable sum towards defraying the expenses of his return to England, the expenses of the journey from the mines to the port of embarkation to be paid by the company, and also all reasonable expenses for the return of his family to England.

*In the event of the said John Oliver French becoming at any time incapable of performing his duty, from ill health or by accident, or from [*356 any other cause, and if his term of service shall thenceforth cease, the said John Oliver French shall be entitled to receive on such termination of his service six months' salary, to be calculated at the rate of salary payable when the said John Oliver French shall become so incapable, and also a reasonable sum towards defraying the expenses of his return to England, the expenses of the journey from the mines to the port of embarkation to be also paid by the company.

This agreement shall have the same force and effect in South America as if the same had been made and concluded in that country.

And, lastly, the said John Oliver French, for himself, his heirs, executors, and administrators, doth hereby covenant and declare, with and to the said Henry James Brooke, Esq., and Lieutenant Colonel Rowan, or the survivor or survivors of them, in trust for the members for the time being of the said company, that he, the said John Oliver French, shall and will, from henceforth and during the said term, well and truly observe, perform, fulfil, and keep all and every the stipulations and agreements herein contained, on his part or behalf to be observed, performed, fulfilled, or kept to the best of his health, skill, and ability, and according to the true intent and meaning of these presents, under the penalty of 300% sterling, and which shall be deemed and considered as liquidated damages, and recoverable accordingly. In witness whereof, the said parties to these presents have hereunto set their hand and seals, the day and year above written.

J. O. FRENCH.

H. J. BROOKE.

C. ROWAN.

*The plaintiff sailed on his voyage on the 29th of August, 1825; proceeded to the mines, where, after many misadventures, he arrived on the 14th of April, 1826; and quitted them in October, 1827, upon receiving the following letter of dismissal from certain honorary directors empowered to act for the company at Buenos Ayres:—

“Senhor Don Juan O’French.

“The directors of the Famatina Company who subscribe in the necessity under which they find themselves of reducing the expense of the enterprise with which they are charged from the impossibility of sustaining them in which they have been placed by the non-remission of funds on the part of the directors in England, have agreed, at a meeting of the 5th inst., to suppress the place of intend-ant hitherto filled by you. In consequence, immediately upon the receipt of

this resolution, you will remain separated (discharged) from the service of the company, and will proceed to deliver over to Senhor Don Pantaleon Garcia all the utensils, accounts, and other appurtenances in your charge; to which effect, the directors transmit a complete order of this date to the above-mentioned Senhor Garcia.

"The directors hope, from the zeal and delicacy of Senhor French, that he will effect this delivery with all the scrupulosity and order possible, in order to avoid torpor in the arrangement of the affairs of the company. All which is communicated for Senhor French's intelligence, and the consequent ends, offering the protestations of their (the directors) accustomed consideration.

(Signed)

RAMOS LARREA.

PEDRO SHERIDAN.

BRANLIO COSTA.

FELIX CASTRO.

"Buenos Ayres, September 10, 1827."

*358] *This letter the plaintiff answered as follows:—

"To the Directors of the Famatina Mining Company at Buenos Ayres.

"Gentlemen:—I have received your communication, in which you announce that you have suppressed the place of intendant, and that I am to remain separated (discharged) from the service of the company immediately that I receive the above-mentioned communication. I protest against the legality of this proceeding, which could not be legally verified, even were it sanctioned by the English direction, in the terms which you have thought fit to employ for effecting such dismissal, seeing that the directors, by contract solemnized and admitted (and even by your own admission in a similar case in your last official letter, which I have in my possession, treating of the discharge of certain of the English miners), are obliged to pay me a year's salary in hard dollars, reckoning from the day of dismissal; and provide me with the sum necessary for the reasonable expenses of the voyage of my family to England, or otherwise give me a year's notice of dismissal, paying the cost of such voyage.

"I am certain that my relations with the London direction are such, as not to warrant the arbitrary sudden dismissal you have resolved on; but in any case, I shall not fail to do the utmost in my power in order to avoid injustice, and to realize the necessary funds, and apply them for conveying to Buenos Ayres those of the company's servants whom you by your present proceedings have left in my hands destitute of help and means, even for this purpose.

"The foregoing is the reply of the undersigned, to your communication of the 10th ultimo. (Signed) J. O. FRENCH.

"La Rioja, October 11, 1827."

*359] *The directors never gave twelve calendar months' notice previously to dissolving the agreement, nor did they pay the plaintiff a twelve-month's salary instead; nor any sum towards defraying the plaintiff's expenses from America to England.

The plaintiff by this action sought to recover damages for the breach of the above agreement, claiming 1815*l.* as a balance due to him from the company. In this sum, among other items, were included 700*l.* for a year's salary, from the date of the dismissal; 320*l.* for the expenses of the plaintiff's journey from the mines to Buenos Ayres, and of the passage of himself, his wife, and four children, thence to England; and 470*l.* for the plaintiff's salary, at 750*l.* per annum, from the 28th August, 1828, to the 14th April, 1829, the end of the third year from his arrival at the mines.

No special damage was proved.

Gaselee, J., before whom the cause was tried at the last London sittings, thought that under the circumstances of the case the plaintiff could not claim these two latter sums; accordingly a verdict was found for the plaintiff for 1025*l.*, with leave for him to move to increase damages to the amount of 1815*l.*, by adding the two sums of 320*l.* and 470*l.*

Wilde, Serjt., now moved accordingly. If the plaintiff had been permitted

to serve out his three years according to the contract, he would have been entitled to the expenses for the return of his family. But unless the contract were legally determined, it must be taken to have been in force for the whole period named in it: and it never was legally determined. The directors were bound by a condition precedent, not to determine the contract without giving a year's notice or a year's salary. Having neglected to give either, they are still liable to the full extent of the agreement; which, as the *plaintiff was to have three years' salary from the day of his arrival at the mines, entitles [*360 him to the 470*l.*, from the 28th of August, 1827, to the 14th of April, 1828, as well as to the expenses of his family's return.

Taddy, Serjt., moved at the same time to reduce the damages to 461*l.* 18*s.* 4*d.*, on the ground that the jury had not made allowance for a sum which it was alleged the plaintiff had received in the course of his employment in America.

TINDAL, C. J. The jury in the main have done justice, and the verdict ought not to be disturbed.

My Brother *Wilde's* motion stands on the construction of the agreement: he argues, that the contract between the parties not having been determined in the mode pointed out by the agreement, it must be considered as subsisting for the whole time originally contemplated. But this action, like others of the same sort, is brought because the contract has been violated; and the case has been correctly dealt with if the jury have given damages for the breach. The agreement says, "The directors shall be at liberty to dissolve this agreement at any time, on giving to the said J. O. French, twelve calendar months' notice in writing, or paying to him twelve months' salary in lieu of such notice; and on paying to him a reasonable sum towards defraying his expenses from South America to England. The jury, therefore, have not erred if they have put the plaintiff in the same situation as if the directors, upon dismissing him, had paid at the time twelve months' salary, and a reasonable sum towards defraying his expenses from South America to England.

It is true, notice of dismissal was not given; but suppose the directors, at the date of their letter had paid down 750*l.* in addition to the expenses of the *plaintiff's own return; would not that have been sufficient? That is the [*361 amount which in effect the jury have given, so that there is no part of the agreement which their verdict leaves untouched. The clause for the payment of the expenses of the plaintiff's family, applies only to the case of three years' service fully performed; but damage for the breach of the contract is what is claimed at the hands of the jury. If any special damage had been alleged and proved, as resulting from the directors not having paid the year's salary at the time of the dismissal, the jury might have found for that; but the sum now claimed for the expenses of the return of the plaintiff's family was not a demand which, under the circumstances, the plaintiff was in a situation to make. The rule, therefore, must be refused; and the defendant's evidence is not sufficiently clear to support the application which has been made on the part of the defendants.

GASELEE, J. (a) The only points reserved were, whether the plaintiff were entitled to the expenses of his family's return, and to salary from August 1828 to April 1829. On those points I had no doubt, and I think that the evidence affords no adequate ground for the application which has been made on the part of the defendant.

Rule refused.

(a) Park J. was absent.

*DOE dem. CAMPBELL v. SCOTT. Jan. 28. [*362

Notice to a weekly tenant to quit at the end of his tenancy next after a week from the date of the notice, sufficient.

THE defendant in this case was a tenant from week to week, and his week commenced on a Wednesday. He received notice to quit on Friday, "provided

his tenancy expired on Friday, or otherwise at the end of his tenancy next after one week from the date of the notice."

After a sufficient time to cover a tenancy commencing with any day in the week this ejectment was brought, and a verdict having been given for the lessor of the plaintiff,

Lawes, Serjt., moved to set it aside and enter a nonsuit, on the ground that the notice was insufficient. It ought, he contended, to have specified some precise time for quitting, or at all events to have required the tenant to quit at the end of his *current week*.

But the Court thought the notice sufficient, and *Lawes*

Took nothing.

***363]** **CUMMING and Others, Assignees of CAVANAGH and Others, Bankrupts, v. BAILY. Feb. 3.*

1. A bill of exchange is a chattel within the meaning of 6 G. 4, c. 16, s. 3, the fraudulent delivery or transfer of which will constitute an act of bankruptcy.
2. Closing the doors and shutters of a bank is a "beginning to keep house," although the banker be not domiciled at the bank.

TROVER for deeds and bills of exchange.

The question in the cause was, Whether Nathaniel Cavanagh, Henry Brown, and William Brown had committed acts of bankruptcy; as to which the facts were as follow:—

Cavanagh and the Browns carried on the business of bankers at Bath and Bristol. Henry Brown lived at Bristol, William Brown lived in the banking house at Bath, and Cavanagh lived at Bath, but not in the banking house.

During the week ending on Saturday the 17th of December, 1825, the holders of the notes of this firm being seized with a panic, a great drainage of the funds of the bank took place.

William Brown, who had proceeded to London for a supply of money on Monday the 12th, returned to Bath on Tuesday the 13th, with 6000*l.*, and proceeded again to London for more the next day.

On Thursday morning the partners remaining in Bath sent a special messenger to William Brown in London, because the absence of another partner would have occasioned suspicion; they urged a further supply, and stated that if the messenger or Wm. Brown did not return with it on Saturday morning they could not go on. The messenger returned by Friday morning with 1000*l.* Pressing applications were forwarded to Wm. Brown for more, and on Sunday morning another 1000*l.* arrived by the post. The partners then wrote to Wm.

***364]** Brown, that they had no funds to meet the demands on them, *and that the house must stop, unless they got a supply of gold immediately. They also sent a friend to urge his return.

On Monday evening the 19th, Cavanagh and Henry Brown came to the resolution of stopping payment, unless Wm. Brown arrived on Tuesday morning. Wm. Brown not having made his appearance on Tuesday morning, the door and shutters of the bank at Bath were by their directions continued closed, and a placard was posted on the bank door, informing the public that the firm had been under the necessity of suspending their payments.

A great number of persons assembled in the street, and were clamorous for admittance, exhibiting their impatience by knocking at the door and otherwise; but neither the door of the bank nor the windows were opened.

Wm. Brown, on his arrival in London on Wednesday evening the 14th, went to the London Coffee House, Ludgate Hill, and was busily occupied till the Saturday evening following in exertions to procure money, when he became so agitated with disappointment, that it was thought he might be tempted to commit violence on himself, and at the persuasion of a friend he removed to Stevens's

hotel in Bond Street, where he was found by a messenger from his partners sent to expedite his return. No money was raised after Saturday, and notwithstanding the most pressing solicitations by his partners for his immediate return, he did not arrive in Bath before Tuesday evening, the 20th.

He then expressed some surprise and regret at the circumstance of the bank having been closed, and desired that any person who called might be admitted to him.

But such as called were admitted by a private door, and the doors and windows of the bank remained closed as before.

*A sum of 300*l.* having been paid by Lady Delawarr into the house of the bankrupts' London correspondent to the credit of the bankrupts, [*365 Wm. Brown enclosed in a letter to Lady Delawarr a bill of exchange for 300*l.*, drawn by Dr. Daniel on W. J. Smith, the property of the firm, and advised her ladyship that he had done this in order to allay any uneasiness she might feel from the alarming circumstances of the times. This letter, it was stated, came to Lady Delawarr's hand about the Christmas week.

The learned Chief Justice told the jury, that if they thought the closing the doors and windows of the bank by Cavanagh and H. Brown, was a beginning to keep house, or an absenting themselves with intent to delay creditors, they had thereby committed an act of bankruptcy. He left it to the jury to determine, whether Wm. Brown had remained in London for the purpose of avoiding his creditors, although he had at first come thither for the lawful purpose of procuring money; and also, whether he had sent the bill of exchange to Lady Delawarr before or after the 20th of December.

A verdict having been given for the plaintiff on all the points,

Taddy, Serjt., moved for a new trial, on the ground that the closing the doors and shutters of the bank was not an act of bankruptcy in Cavanagh and Henry Brown, the bank not being their place of residence, and the *beginning to keep house* described by the statute applying, as he contended, only to the dwelling-house, and not to the shop or place of business of the trader; that Wm. Brown could not be said to have remained in London for the purpose of avoiding creditors, when he had so recently proceeded thither for the purpose of raising money; and that the transfer of the bill of exchange to Lady Delawarr, if it took place previously to the 20th of December, was not a transfer of a chattel to occasion *an act of bankruptcy within the third section of 6 G. 4, c. 16; (a) for which he cited an opinion expressed by Best, C. J., in an [*366 unreported *Nisi Prius* case of *Rigley v. Bousfield*.

Wilde and Russell, Serjts., showed cause.

The closing the bank door and shutters by Cavanagh and Henry Brown was an act of bankruptcy of the most unequivocal description. Within the spirit of the statute, closing the place of business and refusing admission to creditors is more conclusively an act of bankruptcy than closing the dwelling-house: for it is with the place of business that the creditors are certainly acquainted, and there they have a right at seasonable hours to expect their debtor. In *Dudley v. Vaughan*, 9 East, 491, Lord Ellenborough, C. J., ruled, that a trader beginning to keep house with intent to delay his creditors was sufficient to constitute an act of bankruptcy, though he were only denied to be seen, but not denied to be at home. And in *Gillingham and Others v. Laing*, 6 Taunt. 532, a news-

(a) By which it is enacted, "That if any trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution; or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels; or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements; or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

vender, who frequented the Royal Exchange for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him on the Royal Exchange, and afterwards directed a friend, if *the creditor inquired there for him, *367] to say he was not there : it was held, that this was an "otherwise absenting himself," which constituted an act of bankruptcy within the statute 1 Jac. 1, c. 15, s. 2. So, where he saw a creditor at the theatre, and secreted himself under the stage for the purpose of avoiding him.

Then, admitting that William Brown proceeded to London for a lawful purpose, there was ample evidence to warrant the jury in finding that he remained there for the purpose of avoiding his creditors, not having courage to meet them. But at all events the transfer of the bill of exchange (which from the language of the letter containing it, the jury had a right to presume was previous to the 20th of December) was a fraudulent transfer of a chattel within the meaning of the third section of G. 4, c. 16. All the text books lay it down that *goods* and *chattels* comprise every species of personal property, including *choses in action*, 2 Bl. Com. 387, even in forfeitures to the crown : and though a distinction was formerly attempted to be made between bonds and simple contract debts, that distinction was overruled in *Slade's case*, 4 Rep. 93. "From that time to the present," according to Abbott, C. J., in *Bullock v. Dodds*, 2 B. & A. 276, "debts by simple contract have been constantly seized into the king's hands upon outlawry. Indeed, the words *bona et catalla*, jointly or separately, in our ancient statutes and law-writers denote personal property of every kind, as distinguished from real." In the statutes regarding bankrupts the same words have received the same construction from the earliest periods. Thus, bonds and bills have been holden to pass to the assignees under the clauses which vest in them goods in the order and disposition of the bankrupt : *Ryall v. Rolle*, 1 Atk. 172, 1 Ves. sen. 363 ; *Hornblower v. Proud*, 2 B. & A. 327.

*368] **Taddy*, (*Bompas*, Serjt., was with him,) *contrd.* It is not denied that goods and chattels *may* include bills of exchange, but they do not necessarily include them ; and it has been holden they ought not to be described as chattels in an indictment. *Sadi and Morris's case*, 2 East, pl. C. c. 16, s. 37. So that it is competent to the legislature to employ those terms in a more restricted sense, and it is proposed to show that they are so employed in the third section of 6 G. 4. That section makes a fraudulent transfer of goods and chattels an act of bankruptcy ; an act which was formerly esteemed a crime, and punishable as such. The clause creating an offence will receive a more rigid construction than clauses which merely pass to the assignees goods and chattels found in the disposition of the bankrupt ; and this, although the act may be in other respects remedial. In *Bones v. Booth*, 2 W. Bl. 1226, it was held, that where an act is at once penal and remedial, the penal clauses are to be construed strictly. The cases, therefore, which have laid down that bills of exchange pass as chattels to the assignees, do not decide the question, whether the transfer of a bill of exchange is a transfer of a chattel constituting an act of bankruptcy. Those cases, too, were decided under repealed statutes, and the present statute must be construed by itself. Now, it may be collected from the statute itself, that the legislature has employed the words "goods and chattels" in the third section in a limited sense, not including bills of exchange ; for in that section, the operation of which is penal, no mention is made of bills or bonds ; but two acts of bankruptcy are created with respect to goods and chattels : the first, by the party's allowing them to be attached, sequestered, or taken in execution ; the second, by his fraudulently transferring them : from which it might be inferred that the effect of a fraudulent transfer was confined to such goods and chattels as may be the subject of attachment, *sequestration, *369] or execution ; (and this was the ground of the opinion of Best, C. J., in *Itigley v. Bousfield*.) But the language of the seventy-third section makes this clear. That section gives the commissioners power to sell and dispose of any goods or chattels which the bankrupt, being at the time insolvent, may have

transferred to any person, and also any bills, bonds, notes, or other securities which he may have made over under the same circumstances. By specifying the making over of bills and notes, &c., as something distinguished from the transfer of goods or chattels, it is manifest the legislature never intended to affect the transfer of bills with the consequences of a transfer of other chattels.

Nor was the gift, delivery, or transfer, here complete: for the evidence does not show that the bill ever came to the hands of Lady Delawarr, or that she would have accepted it.

[*Per Curiam.* It is the conduct of the donor, not of the donee, that constitutes the act of bankruptcy.]

Then, with regard to Cavanagh and H. Brown, there was no change of place and no denial of creditors; and without one of those ingredients, their conduct could not be esteemed an absenting themselves, or a keeping house with intent to delay creditors.

TINDAL, C. J. I am of opinion that this rule must be discharged. The question is, Whether the evidence in this cause establishes that acts of bankruptcy have been committed by the three partners Cavanagh, Henry Brown, and William Brown. With regard to the former, it appears that they being bankers, and finding themselves insolvent, directed that the door and shutters of their bank should not be opened on Tuesday the 20th of December; and that they were never opened, notwithstanding persons were clamouring on the outside: and the question is, Whether that was not a beginning to keep house within the meaning of the statute.

*It has been contended, the *keeping house* in the statute applies only to the *dwelling* house of the party; and that no act of bankruptcy was [*370 committed, because Cavanagh and H. Brown did not dwell at the bank. But there is no ground for such a distinction: on the contrary, the statute seems to apply more appropriately to the place where the trader's business is carried on, and where his creditors may naturally expect to find him, than to his dwelling-house, where that is apart from his place of business. It might fairly be inferred the bankers were within at the time the creditors were clamorous without, and it is therefore difficult to conceive a clearer act of bankruptcy.

With respect to William Brown, the acts of bankruptcy are of two kinds: one, the absenting himself with intent to delay his creditors; the other, a fraudulent transfer of a chattel. On the first head, the evidence was, that he went to London for the purpose of raising money to support the firm; that he received letters from his partners urging him to return, and stating that the house could not go on unless he did so, or transmitted money; and that, during his stay in London, he was employed at different times in the endeavour to obtain money. The question was, Whether he was so employed the whole of the time, or whether, after his exertions had failed, he did not remain for the purpose of avoiding his creditors. As to that, it appeared that a friend, sent up to urge his return, found him, not at places where he was likely to obtain money, but at the West end of the town, in such distress of mind as to give rise to an apprehension that he had a design against his own existence. It was for the jury to determine whether he was then remaining in London with the hope of raising money, or for some other reason; and I am not dissatisfied with their decision.

Upon the other point the evidence was, that about the Christmas week, the agent of one of the customers *of the firm received in London a letter [*371 written by William Brown, in which he said, that considering the alarming state of the times, and to allay any apprehension, he had enclosed a security to the amount of the money which his customer had in the bank.

The letter contained a bill of exchange for 300*l.*; and assuming, as the jury have properly found, that the letter was written previously to the 20th of December, the question is, Whether a bill of exchange falls within the meaning of the words *goods* and *chattels* in the third section of the 6 G. 4, c. 16, which makes a fraudulent gift, delivery, or transfer of the trader's goods and chattels an act of bankruptcy; and whether that sense can also be put on the same words in

other parts of the act, so that the construction may be uniform throughout. Undoubtedly, in some of the old books, and previously to the decision in *Slade's case*, bills of exchange seem not to have been considered as goods and chattels. (a) But in modern times a different opinion has prevailed; and *goods* and *chattels* have been deemed to include not only things that pass by delivery, but also *choses* in action; an instance of which is presented by the form of this action, which is trover for the bill. It is no answer to say that bills of exchange have not been esteemed chattels under certain acts of parliament creating offences, and that an act of bankruptcy is in the nature of a crime; because, although in times when trade was little practised or understood, some kind of criminality seems to have attached to such an act, such an opinion can no longer prevail, when the legislature itself permits a trader to commit an act of bankruptcy by declaring his insolvency in the Gazette. But the same language is used in the seventy-second section, which enables the commissioners to sell and dispose of goods and chattels in the disposition of the bankrupt, with the consent of *the true

*372] owner. Those words in former acts containing the same provision have been repeatedly holden to include *choses* in action, and in *Hornblower v. Proud* the Judges of the Court of King's Bench were unanimous on the point; and though it has been urged that the seventy-third section would lead to a different conclusion, the provisions of that section, expressed in the same language, were to be found in the statutes upon which the cases just alluded to were decided. But looking at the seventy-third section, we may discover the reason why bills and bonds were particularly specified. That section enacts, "That if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioner shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him."

The first part of the section seems to apply to cases where the conveyance or transfer is by deed; and the second, where it is by manual delivery, without which bills or notes do not usually pass; and *gift* or *delivery*, not *conveyance* or *assignment*, is the mode of transfer of chattels specified in the third section. Then, under the seventy-second section, there has been a general understanding in all the Courts, that *goods* and *chattels* include bills of exchange. Upon the principle, therefore, of giving the same construction to the same language in

*373] different parts of the same statute, we decide *that the transfer of the bill of exchange by William Brown was an act of bankruptcy within the meaning of the third section. Indeed, it would be a very narrow construction of the act, to hold that a banker, whose most valuable property often consists of bills and notes, could not commit an act of bankruptcy by a fraudulent transfer of them.

PARK, J. I am of the same opinion. As to Cavanagh and Henry Brown, the case very much resembles *Dudley v. Vaughan*, 1 Campb. 271. There the trader ceased to appear as usual in his counting-house, and sat upstairs in a parlour; and, his affairs being much embarrassed, desired his clerks to say to any of his creditors who should call, that, on account of the stoppage of a house in Ireland, he was obliged to suspend his payments. Lord Ellenborough said, "If a trader shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so. And, generally, if a trader secludes himself in his house to avoid the fair opportunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the mean-

(a) See the argument for the defendant in *Bullock v. Dodds*, 2 B. & A. 268.

ing of the legislature, and commits an act of bankruptcy. Here the question must turn chiefly upon the intent. It clearly appears that the plaintiff changed his usual place of sitting, and that several of his creditors who called, and must have found him had he remained there, went away without seeing him. Therefore, if he withdrew from the counting-house to the parlour for privacy and seclusion, and with a view to avoid the personal solicitations of his creditors, by so doing he committed an act of bankruptcy." And though the cause was conducted by the Attorney-General of that day, the propriety of this decision was never disputed.

*With respect to William Brown, I concur in the finding of the jury; [*374 for though it is not an act of bankruptcy if a trader leaves his house for the purpose of obtaining money, yet if he fail to obtain it, and from fear or nervousness delays his return, a jury may reasonably infer that he seeks to avoid his creditors. As to the delivery of the bill of exchange, the arguments drawn from the criminal law have no bearing on the question, because, whatever might have been thought in ancient times, an act of bankruptcy is not now a crime, and, under all the bankrupt statutes, *goods* and *chattels* have been held to include bills of exchange; and seeing that a large portion of the property of bankers must consist of such instruments, it would be absurd to hold the contrary. The point was expressly decided in *Hornblower v. Proud*; and as Mr. Justice Best was one of the Judges who pronounced that decision, it is difficult to suppose he could afterwards have held the contrary.

GASELEE, J. I have not a shadow of doubt as to Cavanagh and Henry Brown; and there is no reason for thinking the jury have come to an erroneous opinion as to the conduct of William Brown. The point as to the bill of exchange has been already decided after an elaborate argument.

BOSANQUET, J., abstained from giving any opinion, not having been present during the argument. Rule discharged.

*RATHBONE v. JOHN and DAVID DRAKEFORD. Feb. 4. [*375

One of two who had been partners, having, after the partnership was dissolved, given in an action against the two a *cognovit* for debt and costs as between attorney and client, without the knowledge of his co-defendant, the Court set the judgment aside.

ACTION for money paid to the use of the defendants. The defendant David Drakeford, on the 12th November last, gave a *cognovit* for the amount, and to pay costs as between attorney and client; upon which judgment was entered up and execution issued.

A rule *nisi* was obtained to set aside this judgment and execution, upon an affidavit of John Drakeford that he had dissolved a partnership with David Drakeford in July last; that he had never authorized the plaintiff to pay any sum on account of the partnership; had never heard of the debt in respect of which the supposed payment was made; and that the *cognovit* signed by David Drakeford was signed without the knowledge or consent of John Drakeford, and subsequently to the dissolution of their partnership.

The plaintiff thereupon deposed, that at the request of David Drakeford he had paid the money sought to be recovered in this action to a person alleging himself to be a creditor of the firm of John and David Drakeford; David Drakeford acknowledging the correctness of the demand, and afterwards alleging that he had the sanction of John Drakeford for signing the *cognovit*.

David Drakeford made no affidavit.

Taddy, Serjt., now showed cause against the rule.

The Court will not control the power of a co-plaintiff to release a defendant, except upon a very strong case of fraud: *Jones v. Herbert*, 7 Taunt. 421. And upon the same principle, and subject to the same restriction, they will not control the power of a co-defendant to give a *cognovit*. Here there [*376

is no allegation of fraud; and though the *cognovit* was given subsequently to the dissolution of the partnership, the cause of action was a debt incurred during the partnership. An acknowledgment of one partner, made after dissolution of partnership, would bind the other partner, and a *cognovit* ought to have the same effect.

Wilde, Serjt., in support of the rule, treated the conduct of David Drakeford as a fraud on his partner.

TINDAL, C. J. It is quite clear, that after the partnership was dissolved, one of the parties had no power to bind the other to pay costs as between attorney and client. Rule absolute.

TOMLINS v. LAWRENCE. Feb. 4.

The plaintiff, in an action against the acceptor of a bill of exchange, being called on by rule to deliver up the bill on payment of debt and costs, was, by delivery of the instrument, holden to have complied with the rule, although he had rendered it a nullity by considerable erasures.

THIS was an action by the endorsee against the acceptor of a bill of exchange.

Taddy, Serjt., had obtained a rule, calling on the plaintiff to show cause why the proceedings should not be stayed on payment of debt and costs, and why he should not deliver up the bill of exchange to the defendant.

*377] *The plaintiff now offered to deliver up the bill; but certain extraordinary erasures having been made on it while in his hands,

Taddy objected, that the delivery of a paper so spoliated and rendered a nullity, was no compliance with a rule which called for the delivery of a bill of exchange; and required that the proceedings should now be stayed without payment of debt or costs.

TINDAL, C. J. The delivery of the paper is a compliance with the requisition in the rule; and if any injury has accrued to the defendant, he must resort to ulterior proceedings. The spoliation of the bill, however, is sufficient to justify our making the rule absolute without costs. Rule absolute accordingly.

JOYCE v. PRATT. Feb. 4.

Where defendant, subsequently to arrest, and before perfecting special bail, was committed to criminal custody, in which he remained, awaiting the decision of the twelve Judges on a point of law arising out of his defence on the criminal charge, the Court refused to enlarge, till the opinion of the Judges should have been delivered, the time for perfecting special bail, or to permit the sheriff's bail to render him.

THE defendant was arrested on the 5th of January, and bail was put in to the sheriff for his appearance in eight days of St. Hilary. On the 19th of January he was convicted at the Old Bailey sessions for stealing 2076 pounds of bristles, but judgment was respited; a point of law being reserved for the opinion of the twelve Judges.

*378] *Andrews*, Serjt., on the part of the bail to the sheriff, obtained a rule calling on the plaintiff to show cause why the bail should not have till the fifth day of next Easter term, or until two days after the opinion of the twelve Judges should have been known, to put in and perfect special bail for the defendant, or render him in discharge thereof.

Jones, Serjt., showed cause. The bail are not entitled to the indulgence asked, nor can it be granted without injury to the plaintiff. Bail to the sheriff cannot render; their obligation is only for the defendant's appearance; and till appearance the plaintiff's proceedings are stayed. Then, this Court cannot issue a *habeas corpus*, to charge in a civil action a prisoner in custody upon a crimi-

nal matter; *Walsh v. Davies*, 2 N. R. 245. Nor could the Court of King's Bench do it till bail above have justified: *Sharp v. Sheriff*, 7 T. R. 226.

TINDAL, C. J. The justice of the case is, that upon payment of costs, and putting the plaintiff in the same situation as if bail had been put in in due time, four days be now allowed for putting in and perfecting special bail.

*GREENSLADE v. HALLIDAY. Feb. 8.

[*379]

The plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors.

The defendant, who had rights on the same stream, removed the stakes and the board also.

A verdict having been given for the plaintiff in an action for such removal, the Court refused to set it aside; holding, that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights.

THE declaration stated,

That before and at the time of committing the grievance by defendant therein-after mentioned, a certain close of meadow land, with the appurtenances, situate and being in the parish of Old Cleeve, in the county of Somerset, and near to a certain stream or watercourse there, was in the possession and occupation of one William Hagley the younger, as tenant thereof to plaintiff (the reversion thereof then and still belonging to plaintiff), to wit, at, &c. That long before, and until and at the time of the committing the grievance therein-after mentioned, a great part of the water of the said stream or watercourse did run and flow, and of right ought to have run and flowed, and still of right ought to run and flow therefrom, under a certain arch, unto and into and along a certain channel, and thence unto, into, and over a certain close of defendant, and from thence through a hole under the cellar of a certain dwelling-house, unto and into a certain channel, and from thence unto and into the said close of meadow land, for the irrigating and watering of the said close, and the benefit and improvement of the soil thereof, to wit, at, &c.; yet defendant well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve plaintiff in his reversionary estate and interest of and in the said close of meadow land, with the appurtenances, whilst the same was so in the possession and occupation of the said W. Hagley *the younger, as tenant thereof to plaintiff as aforesaid, and whilst the plaintiff was so interested [*380 therein as aforesaid, to wit, on the 1st January, 1829, at, &c., wrongfully and unjustly, without the leave or license and against the will of plaintiff, pulled down and removed, and caused and procured to be pulled down and removed, a certain board before then erected, and then standing and being in and across the said stream or watercourse, for the purpose of diverting and turning the said part of the said water there under the said arch, and unto and into and along the said channel and close of the defendant, unto and into the said close of meadow land, for irrigating and watering the same and benefiting and improving the soil thereof as aforesaid, and wrongfully and unjustly kept and continued, and caused to be kept and continued, the said board so pulled down and removed as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby, during the time aforesaid, wrongfully and unjustly let down and drew off, and caused to be let down and drawn off, a great part of the water of the said stream or watercourse, which during the time aforesaid ought to have run and flowed, and otherwise might and would have run and flowed, and hindered and prevented the same from running and flowing under the said arch, unto, into, and along the said channel, and thence unto, into, and over the said close of the defendant, and through the said hole and channel unto and into the said close of meadow land for the purposes aforesaid; and by means of,

the several premises aforesaid, the said close of meadow land and the soil thereof had been and were greatly impoverished, deteriorated, and lessened in value, and plaintiff had been and was thereby greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said close of *381] meadow land, with the appurtenances *so in the possession and occupation of the said William Hagley the younger, as tenant thereof to plaintiff as aforesaid, to wit, at, &c.

At the trial before Burrough, J., last Somerset assizes, it appeared that the plaintiff was the proprietor of certain ancient meadow land, near a small stream which flowed through land belonging to the defendant.

For fifty years the tenants of the plaintiff, and their predecessors, had been accustomed to enter on the defendant's land, and pen back the water of this stream, by placing a row of loose stones across it at a certain point; and when the water was so penned back by this dam or obstruction, a portion of it ran through a small archway, along an artificial cut, which passed to some distance over the defendant's land, and thence irrigated the plaintiff's meadow.

In seasons when the loose stones would not pen the water sufficiently high for this purpose, the tenants, as the plaintiff's witnesses alleged, were accustomed to place a board or fender across the stream; but neither the board nor the stones had been permanently fixed, till, in January 1829, the plaintiff's tenant placed a board in front of the stones, and fastened it down by two stakes driven into the bed of the stream, on the top of which stakes were crooks embracing the upper edge of the board.

Whether this board penned the water higher than the ordinary dam of loose stones, or whether a board had ever been used before, except at a remote period, when the plaintiff's land had belonged to the predecessors of the defendant, did not very distinctly appear at the trial; the evidence as to those points being conflicting. But the defendant, conceiving that, at all events, the permanency of the dam might establish for the plaintiff a right to a greater extent than he *382] had enjoyed before, and be prejudicial to her own enjoyment *of a mill above and of water meadows below the dam, caused the stakes to be pulled up and the board to be removed; saying to the tenant at the same time, that until it was proved what quantity of water ought to go, he should exercise no right there.

This declaration, however, the learned Judge excluded, as not being admissible evidence, and seemed to think that the defendant had denied the plaintiff's right *in toto*. But he told the jury, that if the board acted on the stream in an unusual manner, and penned the water higher than it ought to do, the defendant was entitled to pull it down. The mode in which it was fastened down he considered immaterial.

A verdict having been found for the plaintiff,

Merewether, Serjt., moved for a new trial, on the ground that on this evidence the defendant was entitled to the verdict, the plaintiff having attempted to make that permanent, which before had been only occasional; and also on the ground that the evidence of the defendant's declaration had been excluded, and that the jury had been misdirected as to the materiality of the mode of fixing the fender or board.

Wilde, Serjt., showed cause. The declaration of the defendant not having been made in the presence of the plaintiff, was properly excluded. Then, as to the dam, provided the water were not penned to a greater height than before—provided the enjoyment of the right was substantially the same—there was no objection in law to the plaintiff making the dam permanent. The principle laid down in *Luttrell's case*, 4 Rep. 87, and acted on in *Saunders v. Newman*, 1 B. & A. 258, and *Williams v. Morland*, 2 B. & C. 910, is, that provided the enjoyment of the right be *substantially of the same amount as before, slight *383] alterations in the mode of enjoyment are permissible. Thus, a prescription to use water for fulling-mills, will sustain an employment of it for the purpose of corn-mills. In *Saunders v. Newman*, Abbott, J., said, "The owner is

not bound to use the water in the same precise manner, or to apply it to the same mill: if he were, that would stop all improvement in machinery."

But the merely securing the fender by two stakes did not impart a character of permanency to the dam; and, at all events, the defendant could have no right to remove the board.

Merevether. The defendant's declaration, as accompanying an act, ought to have been admitted in evidence. The verdict of the jury might have turned on the supposition that she had denied the plaintiff's right *in toto*, while her expressions accompanying the act complained of would have proved that she contested only the *quantum*.

Then it was most material to the support of the defendant's own rights over the water, that plaintiff should not give a character of permanency to an easement which had previously been only occasional. A verdict for the plaintiff in this cause would establish his right to confine the fender with stakes; which, as they had never been employed before, the defendant was, at all events, justified in removing. [TINDAL, C. J. But she did more; and if in a plea to an action of trespass she had justified removing the stakes, would that have been any answer to a complaint for removing the board also? As the stream would have carried the board away, unless it had been confined, the removal of it, in addition to the removal of the stakes, was no injury to the plaintiff; and unless he show that he is injured *in the enjoyment of his right, he has no cause of [*384 action. *Williams v. Morland*.

TINDAL, C. J. The Court does not think there has been such a misdirection as to induce us to grant a new trial without payment of costs. The question is, Whether the defendant has not done more than she is able to justify? And I do not see my way with sufficient clearness to set aside the verdict. The evidence rejected is not of sufficient importance to authorize such a step. For if it had been admitted, and the jury ought still to have come to the same conclusion, the rejection was not material.

But the short ground on which I decide is, that the defendant has done more than she ought to have done. The board in dispute was fastened by stakes, which was not usual; but the defendant, instead of removing the stakes alone, removed the board also. If a party who had a right to a stone weir were to erect buttresses, one who should oppose the erection of the buttresses could not justify demolishing the weir as well as the buttresses.

The rest of the Court concurred.

Rule discharged.

*SHAW v. The Marquis of WORCESTER. Feb. 3. [*385

Breaches need not be assigned under 8 and 9 W. 3, c. 11, on non-payment of an annuity secured by a warrant to confess judgment on a *mutuatus*.

THE plaintiff had signed judgment and issued execution for the arrears of an annuity, under a warrant of attorney, by which, after reciting the grant of an annuity of 25*l.* the covenant by the defendant to pay it, and a stipulation that judgment should be entered up under the warrant of attorney as a security for the payment, the defendant "authorized and empowered the plaintiff's attorneys, or either of them, or any other attorney of the Court of Common Pleas, to appear in the said Court for him the said Henry Marquis of Worcester, in or as of last Trinity term, next Michaelmas term, or any subsequent term, and then and there to receive a declaration for him in action of *debt upon a mutuatus* against him for the sum of 3400*l.* at the suit of the said Benjamin Shaw, his executors or administrators, and thereupon to confess the said action, or else to suffer a judgment by *nil dicit* or otherwise to pass against the said Henry Marquis of Worcester in the said action, and to be forthwith entered up against him

of record of the same Court for the said sum of 3400*l.*, together with costs of suit. And the said Henry Marquis of Worcester did thereby further authorize and empower the said attorneys, or any one of them, after the said judgment should have been so entered up as aforesaid in the name of him the said Henry Marquis of Worcester, and as his act and deed, to execute one or more effectual release or releases in the law to the said Benjamin Shaw, his heirs, executors, and administrators, of all errors, writs of errors, and of all benefit and advantage thereof, and of all defects and imperfections whatsoever to be committed, occasioned, or suffered in, about, or concerning the *said judgment, or in, about, or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever in anywise concerning the said judgment; and for whatsoever the said attorneys, or any of them, should do or cause to be done in the premises, that should be to them and every of them a sufficient warrant and authority. And the said Henry Marquis of Worcester did thereby agree, that when and as often as any default should be made in payment of the said annuity or yearly sum of 25*l.* 12*s.*, and the whole or any part of any quarterly payment of the same should be in arrear and unpaid by the space of twenty-one days, it should and might be lawful to and for the said Benjamin Shaw, his executors, administrators, or assigns, to sue out execution or executions upon the said judgment against the said Henry Marquis of Worcester, his heirs, executors, or administrators, for so much and such part of the said annuity or yearly sum of 25*l.* 12*s.* as should be then due, together with costs, sheriff's poundage, and officers' fees, and all other incidental expenses whatsoever; and that, without making or entering any previous suggestion, or suing out or executing any writ of *scire facias* or inquiry under the statute made in the eighth and ninth years of the reign of King William the Third, or any other suggestion, writ of *scire facias*, or inquiry whatsoever; and that no writ of error should be brought, or bill in equity filed, or any advantage taken or attempted to be taken by the said Henry Marquis of Worcester, his heirs, executors, or administrators, for or on account of the premises, or any other matter, cause, or thing whatsoever relating to, touching, or in anywise concerning the issuing or executing of any such execution as aforesaid, or any other proceedings which might be had or taken on the said judgment, or to enforce the execution thereof according to the true intent and meaning of those presents."

*387] *Wilde*, Serjt., obtained a rule *nisi* to set aside the execution for irregularity, on the ground that it had issued without any assignment of breaches pursuant to 8 & 9 W. 3, c. 11.

Merevether and *E. Lawes*, Serjts., showed cause. The object of the statute was to save parties the expense of resorting to a court of equity to relieve them from the penalty of a bond. But here was no bond, for the warrant is to enter up judgment by *nil dicit* to a declaration on a *mutuatus*; and further, there is an express stipulation that no advantage shall be taken of any error in proceeding, and particularly of the omission to assign breaches. Then, in *Cox v. Rodbard*, 3 Taunt. 74, it was expressly decided that no suggestion was necessary upon a warrant of attorney with a penal sum conditioned for payment of a less sum by instalments; and in *Austerbury v. Morgan*, 2 Taunt. 195, the decision was the same, although there was a bond with a penalty in addition to the warrant of attorney.

Wilde. The stipulation that no advantage shall be taken of any error, can no more oust the jurisdiction of this Court, or deprive the defendant of the beneficial provisions of a remedial act, than a covenant not to sue, or a covenant not to defend: *Kill v. Hollister*, 1 Wils. 129. Indeed, the main object of the statute 8 & 9 W. 3, was to protect parties against the effect of their own improvident agreements; and according to the language of *Abbott, C. J.*, in *Hurst v. Jennings*, 5 B. & C. 656, "If this is not a case within the very words of the act of parliament, the judgment by virtue of which the execution has issued has been obtained by means of a contrivance used for

*398] the purpose, and calculated to have the effect, if it be *allowed to

remain in force, of defeating the provisions of that act of parliament; and on that ground the execution which has issued on that judgment ought not to stand." But the object of the statute was to reach every species of contract secured by a penalty; and the judgment here is but a penalty to secure the payment of the annuity. A sum secured by a bond was holden to be within the statute, where there was an indenture of even date, by which the party agreed that judgment should be entered against him for any sum which might then or afterwards be due: *Hurst v. Jennings*: and this warrant of attorney being given in a sum larger than the annual amount of the annuity, by way of penalty for securing the annual payment, there is as much reason why the statute should require a suggestion as in the case of a bond with a penalty conditioned for the payment of an annuity. *Cox v. Rodbard* was not a case of annuity, and *Austerbury v. Morgan* was decided without discussion. *Cur. adv. vult.*

TINDAL, C. J. In this case a judgment has been entered up on a warrant of attorney in an action of debt upon a *mutuatus* for 3400*l.*; and it appears on the face of the warrant of attorney, that on the treaty for the purchase of an annuity, it was agreed that such warrant of attorney should be given, and that judgment should be forthwith entered up under it for better securing the payment of the annuity. And this is an application by the defendant to the Court to set aside the writ of execution which has been issued for the amount of the arrears of the annuity, on the ground that the plaintiff ought to have suggested breaches of the covenant for payment of the said annuity, which covenant appears in the recital contained in the warrant of attorney, under the statute of 8 & 9 W. 3, c. 11, s. 8. That statute enacts, "That in all actions upon any *bond or bonds, or on any penal sum for non-performance of any [*389 covenants or agreements in any indenture, deed, or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit." And the question is, Whether a judgment signed under this warrant of attorney falls either within the letter of the act, or the mischief intended to be prevented thereby?

As the law stood at the time this act was passed, if there was a judgment in a court of law for a penal sum, either upon a demurrer, or upon a *cognovit actionem*, or by default, the defendant was exposed to the danger of an execution for the whole penalty, and had no mode of preventing such an inconvenience but by filing a bill in equity; and the statute was penned to prevent such a mischief, by compelling the plaintiff to show, upon the record in the court of common law, the amount of the debt or damages really due, and of enabling the defendant to dispute such amount before a jury. Thus making an appeal to a court of equity altogether unnecessary.

But a warrant of attorney to enter up a judgment as a security for a debt on demand, was known in practice to the Courts of law long before the passing of the statute of William. It was a proceeding subject to their cognisance and interference from the earliest times, and has been regulated by various rules of Court, as the protection of the defendant or the purposes of justice seem to demand: such an instrument, therefore, does not appear to be within the mischief of the act; for the courts of common law might at any time, of their own proper jurisdiction, receive an application and afford redress, if this instrument was made the means of oppression or injustice; and in the present case, if the defendant's affidavits had disclosed any excess in the *amount for which [*390 the *fi. fa.* had issued, beyond the arrears of the annuity, the Court would either have set it aside, or in case of any mistake have referred it to their officer, or if necessary to a jury, to ascertain for what sum the execution ought to stand. The case of a judgment under a warrant of attorney does not appear, therefore, to have called for the interference of the legislature; nor does this mode of securing a debt appear to be comprised within the words used in the act, which speak of judgments by demurrer, confession, or *nil dicit*, and seem rather to apply to such judgments where an action has been really brought by a

plaintiff on a bond or for a penalty, than to this mode of securing an ascertained debt or damage, which was then in use and practice in the Courts.

Whilst, therefore, we agree to the authority of the case of *Hurst v. Jennings*, we think that case is not inconsistent with the class of cases in which it is held that breaches need not be assigned where the judgment has been entered upon a warrant of attorney given as a security; and we therefore think this rule should be discharged.

Rule discharged.

DOE dem. Lord TEYNHAM v. TYLER. Feb. 3.

A remainder-man after a tenant in tail is not a competent witness for the tenant in tail, in ejectment for the entailed property.

THIS ejectment was brought to try the validity of a recovery suffered by the father of the lessor of the plaintiff in 1789.

The lands in question had, by a deed bearing date in 1756, been settled on the father of the lessor of the plaintiff in tail male; remainder among others to Philip Roper, uncle of the lessor of the plaintiff, in tail male.

*391] The objection to the recovery was, that the father of the lessor of the plaintiff, at the time of suffering it, was of unsound mind, or at least so imbecile as to be liable to be practised on.

At the trial before Tindal, C. J., Middlesex sittings after Michaelmas term, the evidence of Philip Roper, the uncle of the lessor of the plaintiff, and ninety years old, was tendered, and rejected on the ground that the witness had an interest in the result of the cause, although the lessor of the plaintiff had sons and grandsons.

A verdict having been given for the defendant,

Jones, Serjt., moved for a new trial, on the ground of the exclusion of this evidence, and the admission of other evidence which he alleged ought to have been excluded; but the objections on this latter head are not stated now, as the decision on them was deferred.

The evidence of Philip Roper ought to have been received; for at his age, with his nephew's family to precede him, his interest was a mere contingency not to be calculated on; and in modern times the objection has always gone rather to the credit than the competency of the witness. *Walton v. Shelley*, 1 T. R. 300. The two authorities which will be relied on for the defendant, *Smith v. Blackham*, 1 Salk. 283, and *Pyke v. Crouch*, 1 Ld. Raym. 730, are anterior to *Walton v. Shelley* by nearly a century. The first was merely a *nisi prius* case: and in neither of them was the point in question the point to be decided in the cause. In *Smith v. Blackham* the question to be decided was the competency of an heir. Treby, C. J., says, "An heir apparent may be a witness concerning the title of the land, but a remainder-man cannot, for he hath a present estate in the land; but the heirship of the heir is a mere contingency. Tenant in tail, *392] remainder in tail; he in remainder cannot be a witness concerning the title of those lands; for he hath an estate, such as it is."

In *Pyke v. Crouch* it was resolved, that "if several estates in remainder be limited in a deed, and one of the remainder-men obtain a verdict for him in an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainder-man in an action brought against him for the same land, though he does not claim any estate under the first remainder-man, because they all claim under the same deed."

But the claiming under the same deed does not of itself confer such an interest as to disqualify a witness; and the criterion is, whether the witness claims *through* or *after* the party named in the deed. Where the witness is privy, or claims *through* a party to the deed, he is disqualified; *aliter*, if he merely claims *after*. Thus, executors and administrators are disqualified, because they claim

through the testator or intestate: but the remainder-man claims after, not through, the tenant in tail; it must, therefore, be questionable whether a verdict for or against the tenant in tail could be given in evidence for or against the remainder-man. It would be hard if he should be bound by a verdict, in a cause in which he could not interfere or sift the testimony produced.

But unless the verdict were evidence against him, it could not be evidence for him. Gilbert says, *Gilb. Ev.* 33, 4th edit., "No one can take benefit by a verdict, that had not been prejudiced by it had it gone contrary."

It may further be contended, that a verdict in ejectment can never be given in evidence for or against a witness in the cause. For in *Aslin v. Parkin*, 2 Burr. 668, Lord *Mansfield says, "The judgment only concludes the [*393 parties as to the subject-matter of it;" and in other actions a precise question is raised on the record, so that it appears what is the subject-matter determined on by the jury; but in ejectment the record discloses nothing; and the whole evidence in the cause must be produced to show what has been found by the jury.

In *Doe on the demise of Jones v. Wilde*, 5 Taunt. 183, the tenant in possession was rejected as a witness; and Mansfield, C. J., put the rejection on the ground, not of the verdict being evidence against him, but his immediate interest to avoid being turned out of possession.

Then, as to immediate interest, it appears from the authorities cited in the note to 2 Wms. Saund. 8, note 4, that a reversion expectant upon an estate tail is not assets; and if not assets, it can scarcely be deemed an immediate interest.

Cur. adv. vult.

TINDAL, C. J. This rule has been moved for on two grounds: first, on the exclusion of evidence which ought to have been admitted; secondly, on the admission of evidence which ought to have been rejected.

The question as to the first ground of exception is this,—Whether the evidence of the remainder-man in tail is admissible on the part of a prior tenant in tail who has brought ejectment to try the validity of a common recovery, on the ground of the incompetency of the tenant in tail by whom it was suffered; and as to this objection, we are of opinion, both upon principle and on the authority of decided cases, that such evidence is not admissible.

The general rule upon which the incompetency of witnesses is founded, is laid down by Chief Baron *Gilbert, in his *Law of Evidence*, p. 106, in these [*394 terms:—"The law looks upon a witness as interested, when there is a certain benefit or disadvantage to the witness attending the consequence of the cause one way." Now this benefit may arise to the witness in two cases: first, where he has a direct and immediate benefit from the event of the suit itself; and, secondly, where he may avail himself of the benefit of the verdict in support of his claim in a future action: and where the case falls within the first description, in which the interest is more immediate and direct, there is no occasion to have recourse to the second principle, where the interest is one degree removed.

Cases daily occur in which the witness is rejected upon the first ground. An executor brings an action for a debt due to his testator's estate: the residuary legatee is not an admissible witness. Not because this verdict would be evidence for or against him in any future suit, for he can neither be plaintiff nor defendant in an action relating to this debt; but because he receives an immediate benefit by a verdict for the plaintiff. So, the tenant in possession, in ejectment, could not be called to prove the title of the defendant under whom he claims to hold; nor could the landlord be called to prove the title of the tenant who defended the possession. Nor in ejectment, after a *prima facie* case is made out against the defendant, could a witness be called to prove himself a real tenant, and the defendant his bailiff; for the verdict and judgment in this very action would have the effect of turning him out of possession immediately.

In all these cases the witness is excluded, not because the verdict would be evidence for or against him in a future action, but on account of the immediate benefit or injury he would receive by the determination of the very cause itself.

*395] *Now the present case falls within this principle. If Lord Teynham recovers in this ejectment, he will be in as of his former right. Nothing is better established than that the lessor of the plaintiff, when he recovers in an ejectment, is in, not merely as of the term which he has granted to John Doe, but as of the right and title which he has proved in himself. If he has only a chattel interest, he is in as of that term; but if he has a freehold, he is in as of that freehold; if tenant in tail, he is in as such tenant in tail. (See the judgment of Lord Mansfield in *Taylor v. Horde*, 1 Burr. 114.)

Lord Teynham, therefore, if he should have recovered a verdict, would have been tenant in tail in possession under the settlement of 1756. But, by the very same verdict, Philip Roper, the proposed witness, would have acquired a vested interest in the remainder in tail under the same settlement.

The seisin of the tenant in tail in possession is the seisin of the remainder-man; the estate in possession, and the estate in remainder being for this purpose but one estate. It seems, therefore, to us, that, upon principle, the witness had a direct and immediate interest in procuring a verdict which should have the effect of revesting his own remainder in tail. And, upon authority, besides the cases which have been referred to in 1 Salk. 283, and 1 Ld. Raym. 730, there is an opinion of Lord Chief Justice Lee in the case of *Commings v. The Mayor of Oakhampton*, Say. Rep. 45: "The person to whom the remainder of an estate is, after the determination of a particular estate, limited by a will, cannot be admitted to prove the will; because he has, although it be remote, a vested interest in the matter in question."

We therefore think, that this rule to show cause ought not to be granted *396] upon the first ground of *objection; but with respect to the second, without giving any opinion upon the result of the rule, we grant a rule to show cause.

Rule granted upon the second objection.

FOSTER and Another v. ROBERT CHARLES. Feb. 8.

Where a party recommends an agent, by making statements which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shown that the recommendation was given from malice, or with a view to the pecuniary interest of the party recommending.

THE first count of the declaration stated, that the plaintiffs, before and at the time of the committing the grievances thereafter mentioned, carried on, and from thenceforth hitherto had carried on trade and business as dealers in tea and other goods, to wit, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap; and thereupon the defendant theretofore, to wit, on the 10th December, 1824, at, &c., contriving and fraudulently intending craftily and subtilly to deceive and injure the plaintiffs, and to induce them to employ a certain person, to wit, one James Jacque, as their agent in the said business at Manchester, in the county of Lancaster, to obtain and receive orders for goods to be supplied by them, and to receive and collect money on their account in the way of their said business, for commission and reward to him payable in that behalf, falsely, fraudulently, and deceitfully represented and asserted to the plaintiffs, that the said James Jacque had then an excellent connexion in that line at Manchester and the neighbourhood, and that the house for which he had done business there, was no longer able to execute his extensive orders. By means and in consequence of which representation, the said plaintiffs, and one William Foster and *397] John Holgate, who at the time *next thereafter mentioned, were partners of plaintiffs in the said business, not knowing to the contrary, but believing therefrom that the said James Jacque had at the time of such representation an excellent connexion in the line of such agency as aforesaid, at Manchester aforesaid, and had obtained extensive orders there for some

house, were induced to hire and engage, and did afterwards, to wit, on, &c., at London, &c., hire and engage the said James Jacque as such agent in their said business at Manchester aforesaid, for commission and reward to him payable in that behalf, and did instruct and authorize him in that capacity to obtain and take orders for the sale and supply of goods by the plaintiffs and their partners in the said business, and collect and receive money for and on account of the plaintiffs and their partners in the way of the said business: and the said J. Jacque, under and by virtue of that employment, did afterwards, to wit, on, &c., at, &c., obtain and take orders for the sale and supply of goods by the plaintiffs and their partners in the said business, to divers persons to a large amount and value, and to collect and receive for and on account of the plaintiffs and their partners in the way of the said business, from divers persons divers sums of money: whereas in truth and in fact at the time the defendant so represented and asserted as aforesaid, the said J. Jacque had not an excellent or any connexion in the line of such agency at Manchester aforesaid, or its neighbourhood, as the defendant then well knew, to wit, at, &c.: and whereas in truth and in fact at the time last aforesaid, the said J. Jacque had not obtained extensive orders, or any orders at Manchester aforesaid for any house whatsoever, as the defendant then and there well knew. And the plaintiffs in fact said, that J. Jacque for want of a good and sufficient connexion in the line of such agency at Manchester aforesaid, and its neighbourhood, did *under [*398 and by virtue of his said employment, obtain orders for the sale and supply of goods on credit by the plaintiffs and their partners in the said business to divers customers of worse and less respectable characters and circumstances than he otherwise would have done, and did thereby induce the plaintiffs and their said partners, who were ignorant of the character and circumstances of such customers, to sell to them on credit, and supply them with goods pursuant to such orders, such goods being in the whole of large value, to wit, the value of 2000*l.* of lawful money of Great Britain: and although the prices for which those goods were so sold ought long since to have been paid and satisfied to the plaintiffs and their partners, yet those customers, by reason of such their characters and circumstances, had hitherto refused and neglected to pay for the same, and the last-mentioned goods were wholly lost to the plaintiffs and their said partners, to wit, at, &c. And the plaintiffs further said, that the said James Jacque, contrary to his duty as such agent, had made away with and converted to his own use, and had not paid or accounted for to the plaintiffs and their partners divers large sums of money collected and received by him as such agent as aforesaid, amounting in the whole to a large sum, to wit, 2000*l.* of like lawful money, which was thereby wholly lost to the plaintiffs and their said partners, to wit, at, &c. And the plaintiffs further said, that J. Jacque, contrary to his duty as such agent, had neglected and refused to render due and sufficient accounts to the plaintiffs and their partners of divers large quantities of their goods sold by him, and of the prices of other of their goods which came to his possession as such agent as aforesaid, the value thereof amounting in the whole to a large sum, to wit, 2000*l.* of like lawful money, which goods were thereby wholly lost to the plaintiffs and their said partners, to wit, at, &c.

*The second and third counts differed from the first in stating more generally the representation made by the defendant to the plaintiffs, and their consequent employment of Jacque. [*399

The *gravamen* in the fourth count was, that the defendant at the time he recommended Jacque as a desirable agent, knew that he had 800*l.* to pay without any means of doing so; and that Jacque being employed by the plaintiffs failed to account to them.

The fifth count stated, that defendant requested plaintiffs to employ Jacque as an agent; it then set forth in detail certain embarrassments which Jacque was labouring under at the time, of which it was material they should have been informed, and which the defendant, although it was his duty to inform them,

wrongfully, deceitfully, wilfully, and fraudulently withheld and concealed from them; *per quod* they employed and were injured by Jacque (nearly as in the first count).

There were four other counts alleging this concealment in various ways.

Plea, general issue.

At the trial before Tindal, C. J., London sittings after Michaelmas term, it appeared that in November or December 1824, the defendant, a soap manufacturer, called on the plaintiffs, wholesale tea dealers, with whom he was on terms of intimacy, and after asking them if they did business at Manchester, said "he had a young friend for whom he was anxious to procure a commission in the tea trade at Manchester: a nice young man; who had an excellent connexion there, and would be a great acquisition to any person who wanted to do business there: the defendant being on such terms with the plaintiffs, he had offered it to them before he proposed it to Smith and Co., a respectable house in the same line of business; that Smith and Co. would jump at the offer; that his friend *400] was so excellent a young *man, that he would rather trust him without security than most men with; that this young man had been doing business at Manchester for a London tea house, who could no longer execute his extensive orders; that he had an uncle at Manchester a clergyman of the Scotch church, who would afford him great facilities in the way of business, and knew all the Scotch travellers in the trade; that defendant would like him to sell soap for defendant and his partner, but feared his other connexions would not allow him time."

The plaintiffs said they had an objection to giving commissions; but the very strong recommendation defendant had given of his friend would induce them to think of it.

Accordingly, in the beginning of 1825, the plaintiffs employed James Jacque the defendant's young friend to do business for them on commission at Manchester. But by the middle of 1827, after repeatedly sending incorrect statements of the amount of his receipts on their behalf, he contrived to be a defaulter to them to the extent of 900*l.* and upwards, and to involve them in bad debts to a much greater amount.

He then took the benefit of the insolvent debtors' act.

Instead of having been employed in the Manchester commission tea trade in the year 1824, as the defendant had stated to the plaintiffs, it appeared that he had, at the recommendation of the defendant, been taken into partnership without any capital by Mr. R. C. Stewart, a warehouseman in London, in July 1823; but great losses having been incurred in that concern, aggravated by a robbery to some amount, Mr. Stewart closed the concern and dissolved the partnership in October 1824.

Jacque was then indebted to Stewart in the sum of 800*l.*, which he undertook by deed, dated November 13th, 1824, to pay by instalments, in two, three, and four years; but nothing was ever paid.

*All this was known to the defendant, who had acted throughout for *401] Jacque, and had negotiated the terms of the dissolution of partnership.

Letters were also put in, written by the defendant to Jacque, after the exposure of the Manchester transactions, in which the defendant exhorted Jacque to write various falsehoods to the plaintiffs with a view to the exculpation of the defendant, and to conceal from the plaintiffs his knowledge of some of the transactions at Manchester.

When the defendant was first applied to on the subject by the plaintiffs, he expressed his regret that his house should have been the means of introducing an unworthy agent to the plaintiffs, but that, as they had been instrumental in bringing the loss on the plaintiffs, he would see his partner on the subject, and see what could be done towards relieving them from it. No step of that kind having been taken, the present action was commenced.

Tindal, C. J., told the jury to consider whether the representation complained of by the plaintiffs had ever been made, and if made, whether it was false with-

in the knowledge of the defendant; for unless it were false within his knowledge, the action did not lie.

The jury having found a verdict for the defendant,

Wilde, Serjt., moved for a new trial, on the ground that the defendant was clearly responsible to the plaintiffs for the consequences of a representation false within his own knowledge, if not for the concealment of circumstances which it was material for him to have disclosed upon recommending an agent.

Jones, Serjt., showed cause. The defendant is entitled to retain his verdict. It is not sufficient to support an action of this kind, that there has been temerity *or inaccuracy in representations made by the defendant, or that he [402 has omitted to disclose all that he knew.

It must be shown that he acted with a wicked intent, resolvable into malice or pecuniary interest. This was the opinion of *Grose, J.*, in *Pasley v. Freeman*, 3 T. R. 54, confirmed by *Haycraft v. Creasy*, 2 East, 92. He considered recommendations of this kind as falling within the class of nude assertions, on which the party deceived might exercise his own judgment; and where he omitted to make inquiries into the truth of the assertion, it became his own fault from *laches*, if he were deceived.

But at all events, an intent to defraud and injure the plaintiffs ought to have been shown. The defendant might have wished to serve *Jacque*, but there is no proof that he intended to defraud the plaintiffs; and though *Jacque* had been unsuccessful as a trader at the time of the recommendation, he might, in the estimation of the defendant, have been a proper person for an agent. Then, the plaintiffs ought to have acted with more vigilance; for if this action can be sustained for what happened at an interval of three years after the defendant's recommendation, he will never be absolved from his responsibility; and a mere recommendation will have the effect of a continuing guarantee upon which he may be charged for eventual misconduct, although the party recommended may have conducted himself properly for years.

TINDAL, C. J. The Court will be better satisfied if this case is submitted to a second jury. But what has been advanced on behalf of the defendant as the legal ground of this action is not warranted by any of the decisions. It has been urged that it is not sufficient to show that a representation on which a plaintiff has acted *was false within the knowledge of the defendant, and [403 that damage has ensued to the plaintiff, but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff.

PARK, J. I do not agree in the proposition maintained by my Brother *Jones*. In *Tapp v. Lee*, 3 B. & P. 371, *Chambre, J.*, said, "It would be an absurdity in law to hold that if a man draws another into a snare, the party suffering should have no remedy by action. An action on the case for deceit is an action well known to the law; and I cannot agree in the argument which has been used for the defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood. As to the case of *Haycraft v. Creasy*, I agree with the majority of the Judges who decided the point of law. In that case there was no fraud; but fraud is the foundation of the action. There the defendant himself was misled; everything which he stated he believed; the ground of action therefore totally failed."

GASELEE, J. I do not collect from the decisions that more is necessary to maintain this action than the untruth of the suggestion which has been the occasion of *injury to the plaintiff, and the knowledge of its untruth by [404 the defendant.

BORANQUET, J., concurred.

Rule absolute.

WEST v. TAUNTON. Feb. 9.

A suggestion that defendant defends by A. B., "who has been appointed solicitor on behalf of his majesty, and acts as such in this behalf," is a sufficient disclosure to the Court that A. B. has authority to act under 9 G. 4, c. 25, and plaintiff cannot treat the plea as a nullity, although, otherwise than by such suggestion, the record does not show that the cause concerns matters of revenue.

TROVER for bank-notes, sovereigns, and a watchseal.

The appearance entered at the filacer's office was,

"Middlesex.—Samuel Hercules Taunton, ats. William Joseph West, cap. returnable fifteen days of St. Martin. J. G. Walford."

A declaration having been sent to Mr. Walford, with notice for the defendant to plead within the usual time, the following plea was filed:—

"And the said Samuel Hercules Taunton, by Joseph Green Walford, who has been duly appointed solicitor on behalf of his majesty, under the directions of the commissioners of his Majesty's customs, and who acts as such solicitor under such directions in this behalf, comes and defends the wrong and injury when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, in manner and form as the said William Joseph West hath above thereof complained against him; and of this he, the said Samuel Hercules Taunton, puts himself upon the country," &c.

The plaintiff thereupon signed judgment, treating this plea as a nullity, because the defendant had neither appeared personally nor by an attorney of this Court appointed by him, but by a solicitor of his majesty, who had no authority to act as attorney except in revenue matters, pursuant to 9 G. 4, c. 25, and there was nothing to show that revenue matters were in question.

*405] *Upon an affidavit by the defendant that he had no interest in the cause, and was indemnified by the commissioners of his majesty's customs, having seized the property sought to be recovered (including the watchseal) in his capacity of an officer of police;

That he believed the said property to be the proceeds of a forged note for the payment of money the payment of which was obtained from the receiver-general of his majesty's customs; and

That Joseph Green Walford had been duly appointed solicitor to the customs;

Wilde, Serjt., obtained a rule *nisi* to set aside the judgment, and, upon delivery to the plaintiff of the seal referred to in the defendant's affidavit, and payment of costs up to the time of signing judgment, to stay the proceedings in the action as to the seal, or to strike out the part of the declaration relating to such seal.

Taddy, Serjt., showed cause. A defendant must either appear personally or by an attorney of the Court, who acts on his retainer; unless in revenue matters, in which, by statute, the solicitor of the crown is permitted to act, although he be not an attorney of the Court.

The statute 9 G. 4, c. 25, authorizes the appointment of persons to act as solicitors on behalf of his majesty in any court or jurisdiction in revenue matters, and that when any person has been appointed to be solicitor or attorney on behalf of his majesty, it shall and may be lawful for such person to act and practise as such solicitor or attorney. But before such solicitor can intervene in a cause, and act without so much as stating that he acts on behalf of the defendant, the Court must be apprised by previous application or otherwise that the cause concerns revenue matters, otherwise the solicitor is without authority.

*406] *The attorney for the lord mayor is nominated by his lordship in open court, and his name is placed on record; but here Mr. Walford is not an attorney of the Court, and there is nothing to show that he has authority to act for the defendant, or that he is amenable to the jurisdiction of this Court. The plea, therefore, has been properly treated as a nullity.

Wilde. In the recent case of *Rowe v. Brenton*, the Court of King's Bench granted a trial at bar, upon the suggestion of the Attorney General that the crown was interested in the cause, without inquiring into the nature of the

interest. The averment in the commencement of the plea in this cause, that J. G. Walford is solicitor to his majesty and acts in his behalf, is a sufficient intimation of his authority for the Court to proceed on.

TINDAL, C. J. I have no doubt as to the authority of Mr. Walford to appear as the attorney in this cause. In ancient times, previously to the statute of Westminster, no persons were permitted to appear by attorney. The practice being then established by statute, the multitude of persons who assumed to act in that capacity was found inconvenient, and from the time of James the Second to George the Second various acts were passed for the regulation of attorneys, prescribing certain modes of education and other requisites as preliminaries to admission, and imposing penalties on such as might act without observing the necessary formalities.

The object of the 9 G. 4, c. 25, was to exempt from these penalties persons who, without going through the course prescribed, might be appointed to act as attorneys or solicitors for his majesty. The first section enacts, that "Whenever any person has been or is or shall be appointed to be solicitor or attorney on behalf of his majesty, under the orders and directions of the *commissioners of the treasury, customs, excise, or stamps, or under the orders and direc- [407] tions of any commissioners or other person or persons having the management of any other branch of his majesty's revenue for the time being, it is and shall and may be lawful for such person to act and practise as such solicitor or attorney under such orders and directions in all and every court and courts, jurisdiction and jurisdictions, place and places, in every part of the United Kingdom; and anything in any act of parliament, or in any order or rule of any court of justice, or any law, usage, or custom, in force in any part of the United Kingdom relating to solicitors or attorneys, or to the admission or practice of such solicitors or attorneys, to the contrary in anywise notwithstanding." The second, "That every person who shall or may have acted as such solicitor or attorney, under or in pursuance of or in obedience to any such appointment, orders, and directions as aforesaid, shall be and is hereby respectively indemnified for and on account of the same, and of any act or thing done in pursuance of or in obedience to or in conformity with such appointment, orders, and directions; and if any action, suit, prosecution, or proceeding, hath been or shall be commenced against any person for or in respect of any act, matter, or thing done under such appointment, orders, or directions as aforesaid, it shall be lawful for the defendant or defender in any such action, suit, prosecution, or proceeding, in or before whatever court the same may be commenced or had, to apply to such court by motion in a summary way to stay all proceedings whatever against such defendant or defender; and such court is hereby required to make order for that purpose accordingly." And the language employed by Mr. Walford in this plea sufficiently discloses to the Court that he is within the statutory exemption. By the same clause also he has authority to act as attorney for those by whom he is appointed.

*The plaintiff, therefore, had no right to treat this plea as a nullity: [408] but we do not conclude him by this decision, because he may sue for the penalty if there be a want of the requisite authority.

PARK, J. I am of the same opinion. The object of the 9 G. 4, c. 25, was to exempt the solicitors of public boards from the penalties attached to persons who practise as attorneys without having been regularly admitted. It has been objected, that one who acts as attorney should always be amenable as such to the authority of the Court in which he acts: I am not prepared to say that the party acting in this cause would not be so.

GASELEE, J. It was not necessary that any previous application should have been made to the Court to enable Mr. Walford to act in the cause. From the pleadings and the defendant's affidavit it sufficiently appears that a matter of revenue was in question.

BOSANQUET, J. In revenue matters persons who have been appointed pursuant to the 9 G. 4, c. 25, are authorized to act as attorneys. Mr. Walford appears by affidavit to have been so appointed; and the defendant being entitled to employ him under the circumstances of the case, he was authorized to act.

The statute does not confine the privilege to cases in which the crown is concerned. Rule absolute.

The Court ordered, that on the delivery of the seal according to the terms of the rule, the plaintiff should not proceed for nominal damages. See *Brunsdon v. Austen*, Tidd. Pr. 571, *Pickering v. Truste*, 7 T. R. 53, *Tucker v. Wright*, 3 Bingh. 601, *Earle v. Holderness*, 4 Bingh. 462.

*409]

*COOK v. WARD. Feb. 9.

1. It is a libel to publish in a newspaper a story of an individual calculated to render him ludicrous, although he may have told the same story himself.
2. Proof that the defendant accounted for the stamp-duties of the paper in question, is proof of publication.

LIBEL. The declaration, after the usual inducement of the high estimation in which the plaintiff was held among his neighbours and other worthy and estimable subjects of this realm at Chelmsford, stated that, before the committing of the several grievances by the said defendant as thereafter mentioned, one William Corder, who had been theretofore tried and convicted of murder at Bury, to wit, at Chelmsford aforesaid, in the county aforesaid, was about to be hanged for such crime, to wit, at Chelmsford in the county aforesaid. Nevertheless, the said defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending, to injure the said plaintiff in his said good name, fame, credit, respectability and reputation, and to bring him into public scandal, infamy, ridicule, contempt, and disgrace, with and among all his neighbours and other good and worthy subjects of this realm, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did compose and publish, and cause and procure to be composed and published, of and concerning the said plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the said plaintiff; that is to say, "A Cook (then and there meaning the said plaintiff) mistaken for Jack Ketch. (From a correspondent.) The

*410] following ludicrous occurrence took place at Bury shortly after the conclusion of the trial of Corder (meaning the said W. Corder):—A respectable deputy overseer (meaning the said plaintiff), not two miles from the parish of St. Mary's in this town (meaning the town of Colchester, in the county aforesaid), like many other Gents, had the curiosity to hear Corder's trial. Accordingly, he (meaning the said plaintiff) went to Bury, and got admission into court; and the trial being ended, he adjourned to an inn (not of the highest class) to take some porter, amidst a dozen others, who were perhaps as risky as himself. His appearance, which we (meaning the said defendant) suppose must have been very singular, struck the company that he must be a man 'out of the common way.' Accordingly, the question was whispered amongst them, who he could be: at length, after a deal of pro and con, it was decided that he could be no other personage than Jack Ketch. After a short pause, one of them emphatically said to him, 'Pray, Sir, arn't you the gemman that's come down to hang Corder?' Of course such a question was the means of his (meaning the said plaintiff's) bidding them a respectful farewell.

The stupid elves mistook him (meaning the said plaintiff) by his look, 'Stead of the Jack, he proved to be the Cook.' By means of the committing of which said several grievances by defendant as aforesaid, the plaintiff had been and was greatly injured in his good name, fame, respectability, credit, and reputation, and brought into public scandal, contempt, ridicule, infamy, and disgrace, with and amongst all his neighbours, friends, and acquaintance, and other good and

worthy subjects of this realm, insomuch that divers of those friends, neighbours, and subjects had, on account of the committing of the said several grievances by the said defendant as aforesaid, from thence hitherto wholly *refused, and still did refuse, to have any transaction, acquaintance, or discourse [*411 with the said plaintiff, as they were before used and accustomed to have done, and otherwise would have done, or to hold or permit any intercourse or society with, or to receive or admit him into their respective houses or company, to wit, &c.

At the trial before Gaselee, J., Chelmsford Summer assizes 1829, the proof of publication was by the production of the certified copy of the defendant's affidavit filed at the stamp office pursuant to the 38 G. 3, c. 78. In this affidavit the defendant was described as "Edward John Ward of Colchester, in the county of Essex, printer, publisher, and sole proprietor of the Colchester Gazette," and the place of printing the same, as intended to be "at the printing office of the said Edward John Ward, belonging to his dwelling-house, situate No. 25, Head street, in the parish of St. Mary at the Walls, in the borough of Colchester."

The title of the newspaper when produced, appeared to be "The Colchester Gazette, printed and published by E. J. Ward (the sole proprietor), Head Street, Colchester."

The distributor of stamps further proved that the defendant, as proprietor of the paper, had accounted with him for the duty on advertisements. And a newspaper of the day on which the libel appeared, August 23d, 1828, was produced, marked with various charges in red ink, which corresponded with the sum paid by the defendant to the distributor.

It was objected, on the part of the defendant, that the certified copy of the affidavit ought not to be admitted as proof of publication, inasmuch as it did not exactly correspond with the description in the newspaper itself. The learned Judge thought that if it were competent to the publisher of a newspaper to raise such an objection, the purpose of the statute in requiring *his affidavit would be defeated. He therefore admitted the affidavit in evidence. [*412

A witness then stated that subsequently to the publication of the libel, the plaintiff, as assistant overseer of the parish of St. Mary at the Walls, was present at a meeting of the burgesses to produce the poor's rates, when the office of mayor having been declined by a gentleman who had been proposed for it, one of the aldermen said, "If you don't accept the office, you shall be the first I will hang when I come into office;" whereupon some one, pointing to the plaintiff, said, "There is Jack Ketch;" upon which there was a general roar of laughter.

It appeared that before the publication in the newspaper the plaintiff had told the story of himself to a party of his acquaintance at a public-house in Colchester.

The jury gave a verdict for the plaintiff, with 10*l.* damages.

Jones, Serjt., in Michaelmas term, moved to set aside this verdict and enter a nonsuit, on the ground, first, that there had been no sufficient proof of publication, the title of the newspaper not corresponding with the affidavit at the stamp office; and, secondly, that the declaration containing no allegation of special damage, evidence of the laugh against the plaintiff at the vestry ought not to have been admitted; particularly as the plaintiff was the cause of the laugh, by originally circulating the story himself.

He also moved in arrest of judgment, first, that there was nothing in the alleged libel calculated to injure the plaintiff, or even to make him the object of ridicule. The production complained of was a dull joke, intended, no doubt, to raise a laugh, but not at the expense of the plaintiff. Secondly, that the innuendoes referred to facts *not sufficiently connected with the statement [*413 in the inducement, and the libel, although alleged to be of and concerning the plaintiff, was not alleged to be of and concerning him and the facts mentioned in the inducement. *Craft v. Boite*, 1 Wms. Saund, 241, *Hawkins v.*

Hawkey, 8 East, 427, Todd v. Hastings, 2 Wms. Saund. 307, Rex v. Marsden, 4 M. & S. 164, Rex v. Horne, Cowp. 672.

The Court thought there was nothing in the objections in arrest of judgment, but granted a rule *nisi* on the other points.

Spankie, Serjt., now showed cause. The description of the paper tallied sufficiently with the affidavit at the stamp office. There was a substantial compliance with the requisitions of the act, the object of which was to furnish means of discovering readily the responsible proprietor of a newspaper, and the intention of the legislature might always be defeated by fraud if a proprietor could shield himself by making a colourable difference between the title of his paper and the contents of his affidavit. He is the last person, therefore, to whom it can be open to take such an objection. But here was ample proof of proprietorship independently of the affidavit. Rex v. Topham, 4 T. R. 126, and Rex v. Franklin, 17 How. St. Tr. 626, show that the adoption of the paper by the defendant is sufficient to connect him with the publication; and in Rex v. Amphitt, 4 B. & C. 35, the delivery of a newspaper to the officer at the stamp office was holden a sufficient publication to sustain an indictment for libel. Here the defendant not only delivered the paper, but accounted with the officer for the stamps.

As to the evidence of what passed at the vestry, it was not offered as evidence *414] of special damage, but to *show the natural and intended consequence of the libel.

Jones. The variance between the affidavit and the title of the paper is fatal. The object of the 38 G. 3 was to facilitate the proof of publication by prescribing a certain course which is to be conclusive on the defendant. But the act does not exclude other modes of proof; and therefore if a party elect to take to the statutory proof, he must be careful to see that he is enabled to pursue its provisions; and the question is not whether the defendant shall be enabled to avail himself of his own inaccuracy, but whether the plaintiff can produce the proof required by the statute. In Murray v. Souter, tried before Lord Tenterden in July last, the defendant was proprietor of the Manchester Courier, and in the affidavit had described his residence to be in Red Lion street, St. Ann's Square. On the paper it was described as in St. Ann's Square; and it was contended that the variance was immaterial, because one side of the house was in Red Lion street, and another in St. Ann's Square. But Lord Tenterden held, that as the party was not excluded from other proof of publication, if he relied on the statutory proof, he must bring himself within the statute, and that the discrepancy objected to was fatal.

Then, the payment of the stamp duty, even if it could be considered evidence of proprietorship, is no evidence of publication. In Rex v. Topham, publication at the office of the paper was proved.

But, at all events, the plaintiff having himself told the story complained of, had no claim for damages; and the evidence of what passed at the vestry ought not to have been introduced, because it was impossible to say whether the persons present were acquainted with the *story through the defendant's *415] newspaper or the plaintiff's own narration.

TINDAL, C. J. This rule has been obtained on two grounds; first, that the publication of the libel in question was not made out by sufficient evidence; and secondly, that with a view to the damages evidence was improperly received.

Upon the first point it will not be necessary for the Court to give any opinion as to the evidence under the statute, because, independently of that, there was abundant evidence of publication to go to the jury. The identical paper was produced, exhibiting the crosses and marks by which the defendant had accounted for the stamp duty, and had actually paid it to the collector. Can any one doubt that this was evidence to go to the jury?

Upon the second point it has been contended that the damages were given by the jury in consequence of evidence which ought not to have been admitted,—evidence of the plaintiff's having been the object of laughter at a public vestry.

But the declaration alleges that by means of the libel the plaintiff was brought into contempt and ridicule among his neighbours and acquaintance; and the evidence objected to is, that he was laughed at at a public meeting. The evidence, however, was properly admitted as identifying the subject of the libel, and as a proof of the consequences necessarily resulting from its publication.

It is urged, however, that the plaintiff could have no claim to damages, because he had told the story of himself. If it could have been shown that he had authorized the publication of the story, the Court would have granted a new trial. But there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a publication of it to *all the world through the medium of a newspaper. The rule must be [*416 discharged.

PARK, J. I abstain from giving any opinion on the construction of the statute, because the point is now pending in another court; but there was in this case ample evidence of publication, independently of the affidavit, and it would have been strange if the jury had drawn any other conclusion.

The other evidence which has been objected to was not admitted for the purpose of showing special damage, properly so called, but to identify the plaintiff as the person to whom the ridicule of the libel attached.

As to the plaintiff's having told the story of himself, that will not justify the defendant in publishing it all over the country.

The rest of the Court concurring, the rule was

Discharged.

SHARPE and Another, Assignees of HARRISON, an Insolvent, v.
THOMAS. Feb. 9.

A warrant of attorney given to a particular creditor by one who at the time intends to take the benefit of the insolvent debtors' act, is a charge on property or a transfer of it by assignment within the thirty-second section of 7 G. 4, c. 57.

By the 7 G. 4, c. 57, s. 32, it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, *bond, bill, note, money, property, goods, or effects whatsoever, [*417 to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said court for his or her discharge from custody under this act."

Harrison, the insolvent, finding his affairs embarrassed, and having expressed intentions of taking the benefit of the insolvent debtors' act, called his creditors together on Friday, the 5th of January, 1827, at Southampton, and gave instructions for an assignment of all his property to trustees in trust to pay his creditors at large 10s. in the pound.

The same night he went to London, and on Monday, the 8th, executed a warrant of attorney to his brother-in-law, the defendant, to secure him 700*l.* and interest; the defendant to be at liberty forthwith, or at any time thereafter to enter judgment and issue execution for the same.

The defendant entered up judgment on the 12th, issued execution on the 15th, and on the 22d had the whole of Harrison's goods and stock appraised to him at 395*l.* 12*s.*

The other creditors got nothing; and one of them having arrested Harrison on the 7th of February, he *was declared insolvent, and discharged under *418] the statute the 22d of March in that year.

The plaintiffs, his assignees, then sought to recover from the defendant, in an action for money had and received, the money which came to his hands under the above warrant of attorney, and at the last Winchester assizes a verdict was given for the plaintiffs, Tindal, C. J., before whom the cause was tried, directing the jury that the warrant of attorney executed by Harrison was void if executed with the intention of petitioning the Court for his discharge under the insolvent debtors' act.

Merewether, Serjt., obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, on the ground that the execution of the warrant of attorney by Harrison was not a transfer of, or charge upon his property within the thirty-second section of 7 G. 4, c. 57. He relied on *Doe d. Mitchinson v. Carter*, 8 T. R. 57; where a lessee having covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; and it was held that this was no forfeiture of the lease; and on *Thompson v. Freeman*, 1 T. R. 155, where the defendant upon joining with a bankrupt as surety in two bonds, having received a counter bond of indemnity, and previous to the bankruptcy, before the two bonds became due having received a warrant of attorney to confess judgment from the bankrupt, and having taken possession of goods under it, it was held that he was entitled to retain them against the *419] assignees, *though the two bonds were not discharged by him till after the execution, nor had the obligees then threatened to resort to him for payment.

Holbird v. Anderson, 5 T. R. 235, was also cited, to show the validity of a warrant of attorney given to and acted on by one creditor after a judgment obtained and execution sued out by another.

Wilde and Bompas, Serjts., showed cause. The jury having found that this warrant of attorney was given in contemplation of taking advantage of the insolvent debtors' act, the instrument is void at common law as being an attempt to defeat the object of a statute, and any critical examination of the language of the statute becomes unnecessary. But a warrant of attorney is a security for money (*Mouys v. Leake*, 8 T. R. 411), within the meaning of the act. It operates as a charge upon the property of the person giving it; and in *Miles v. Rawlins*, 4 Esp. 196, Lord Ellenborough said it appeared to him to constitute a *debitum in presenti*. Then, the charge being voluntary, and the party insolvent, the instrument is void by the express language of the act. In *Thompson v. Freeman*, and *Holbird v. Anderson*, there was neither bankruptcy nor insolvency, nor any attempt to defeat the provisions of a statute. And in a subsequent stage of the case of *Doe v. Carter*, 8 T. R. 300, where the Court found that the warrant of attorney had been demanded and given with the express intention of eluding a covenant by a tenant not to assign his lease without the consent of his landlord, they held the instrument to be void.

Merewether. A warrant of attorney to confess judgment is no more than an *420] acquiescence in a just demand, *and cannot be esteemed fraudulent in itself, especially as all judgments are, in contemplation of law, *in invitum*. *Lee v. Thurston*, 1 Chit. Rep. 267. Indeed, the validity of such instruments under certain restrictions is recognised by the statute 3 G. 4, c. 39, which is incorporated into the insolvent act 7 G. 4, c. 57, s. 33. They are not, therefore, *per se* void against the bankrupt or insolvent statutes, and the jury have not found any fraud in the present case as they did in effect in the second report of *Doe v. Carter*. The transferring, delivering, or making over any security for money in the language of the thirty-second section of 7 G. 4, c. 57, must mean the transfer of property holden by way of security, and not the original act of giving security; at least by means of a warrant of attorney: otherwise the

thirty-second section, which provides for the case of warrants of attorney executed within twenty-one days of the insolvent's petition, and the thirty-fourth, which impliedly sanctions proceeding on warrants of attorney previously to the imprisonment of the insolvent, would have been unnecessary: and if it had been intended that the insolvent should, under whatever circumstances, be prohibited from giving a warrant, there would have been an express enactment to that effect as in the 6 G. 4, c. 16, s. 3, where the giving a warrant of attorney to confess judgment under certain circumstances, is, for the first time, made an act of bankruptcy.

As to the warrant operating as a charge, it is the execution only, and not the judgment which constitutes any charge on personal estate since the statute 29 Car. 2.

TINDAL, C. J. The statute on which this argument has been raised was passed for the prevention of *fraud, and ought to receive a large and liberal construction. The question here is, Whether a warrant of attorney given for the express purpose of entering up judgment in four days, and seizing the effects of an insolvent to the detriment of his creditors at large, comes within the words of the statute, "shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever." [421]

A warrant of attorney of itself perhaps would not; but under the circumstances of this case, the instrument was given as, and constituted a charge on, the property of the insolvent. And Doe v. Carter makes against the defendant, for when the intention of the parties had been ascertained, a warrant of attorney was in that case holden to operate as an assignment of a lease. The only part of the argument on which I have felt any pressure, is that which has been drawn from the two clauses of the act specifically relating to warrants of attorney; the thirty-third and thirty-fourth: but those sections relate not to fraudulent warrants of attorney, but such as have been given *bonâ fide*, which are nevertheless to be holden void, unless filed twenty-one days before the insolvent's petition, and executed before his imprisonment.

PARK, J. The distinction taken between fraudulent warrants of attorney, and those given *bonâ fide*, which are recognised by the act under certain restrictions, is well founded; and the verdict of the jury, therefore, relieves us from any difficulty. In Doe v. Carter, the warrant of attorney was holden to be fraudulent when it was discovered to have been given for the express purpose of defeating a covenant in a lease; and here, the jury have found that the warrant was given with the *intention of taking the benefit of the insolvent act, that is with the intention of defrauding the rest of the creditors; so that the judgment [422] obtained falls within the observation of Lawrence, J., in Doe v. Carter, 8 T. R. 302, "How can it be considered to be *in invitum*, when it is stated that the warrant of attorney was executed for the express purpose of getting possession of the lease, which could not otherwise be obtained, and that the tenant concurred in that intention? The parties were aware that this lease could not be directly assigned by the lessee in satisfaction of his debt; and therefore they agreed to do that by the appearance of an adverse judgment which by their own act they could not effect; so that it was to appear to be done *in invitum* when in truth it was done voluntarily." Here the defendant could not have obtained possession of the insolvent's effects but by means of the warrant of attorney; it was therefore a charge on his property within the meaning of the thirty-second section of 7 G. 4, c. 57.

GASELEE, J. Upon the authority of Doe v. Carter, I consider this instrument to have been a charge on the property of the insolvent within the meaning of the thirty-second section of 7 G. 4, c. 57; at least it became so when acted on, and it was intended to be acted on within four days. The thirty-third and thirty-fourth sections apply to warrants of attorney, however meritorious, which are nevertheless to be without effect unless filed twenty-one days before the insolvent's petition.

BOSANQUET, J. I am of opinion that this rule ought to be discharged. The object of the 7 G. 4 was to effect an equal distribution of the insolvent's property, and the act ought to be so construed as to give effect to that object. The jury in this case have found that the instrument was given with the view of taking the benefit of the insolvent debtors' act, and according to that finding the object of it must have been to give a fraudulent preference to a particular creditor. Under those circumstances it was a charge on the property of insolvent within the meaning of the thirty-second section of the act; and when the effects were sold, it may be taken to have operated as an assignment according to the principle established in *Doe v. Carter*.

Rule discharged.

BARLING v. WATERS. Feb. 10.

Allowance of bail discharged on affidavit of perjury by bail uncontradicted. Detainer against principal in custody, refused.

ONE of the bail in this cause swore that he had property in the funds, and the other that he had paid the amount of a judgment against him in the palace court.

Merewether, Serjt., upon affidavits which showed that these and many other statements made by the bail were false, obtained a rule *nisi* to quash the rule for the allowance of bail, and to detain the defendant, then in the custody of the sheriff of Middlesex for another cause.

Upon affidavit of service of this rule upon the defendant and both of the bail, and of an order for the bail to attend the court,

Per Curiam. No cause being shown, we order the allowance of bail to be discharged, but we cannot make absolute the latter part of the rule, the bail not being before us, and knowledge of their misconduct not being brought home to the defendant.

HOULDEN v. FASSON. Feb. 10.

Writ returnable the 3d of November instead of "the morrow of All Souls," quashed for irregularity.

WILDE, Serjt., obtained a rule *nisi* to set aside the *ca. sa.* issued in this cause; the bail-bond taken thereon; the assignment of the bail-bond, and all subsequent proceedings, for irregularity, with costs.

The irregularity was, that by mistake the writ had been made returnable on "the 3d of November," instead of the usual return, "the morrow of All Souls;" a mistake which the plaintiff prayed leave of this court last term to amend, but was refused.

Merewether, Serjt., showed cause. Although the statute of 24 G. 2, c. 48, s. 7, requires the writ to be returnable on "the morrow of All Souls," that is, the day of the morrow of All Souls, which this writ was, it does not in terms require to be returnable on that day by that particular description. And, although the practice has been to use that description of the day, still the Court ought (as they have done in some cases) to look at the substance and not the form, and support the writ, which, in truth, appears to be returnable on the proper day. If the writ be described in the declaration on the bail-bond as returnable "on the morrow of All Souls," to wit, the 3d day of November, the statute is complied with by such an allegation: and when the writ is produced to prove that allegation, there can be no variance. In all the cases in which a writ has been set aside for being returnable on a day certain instead of a general return day, the day certain has not been the identical day of the general return.

Miles v. Bond, 1 Str. 399, Inman v. Huish, 2 N. R. 133, Walker v. Hawkey, 5 Taunt. 853, Crofts v. Stockley, 5 Bingh. 32, Johnson v. Dobell, 1 Mo. & P. 28. On serviceable process, the party is obliged by statute to endorse the actual day of the month; and the object of the legislature was to render the process thereby more intelligible. [PARK, J. The legislature by requiring the day of the month to be endorsed, show that they considered it something different from the old legal style of the day, which, but for such enactment, the party must have employed.] The statute compels him to use the new appellation; before, he was at liberty to employ the new or the old.

TINDAL, C. J. These common returns have been handed down from time immemorial, and it is singular we should now be called on to make alterations and permit a party to frame writs of his own. Rule absolute.

*SAWBRIDGE, Demandant; JEYES, Tenant; PARSONS and Four [426
Others, Vouches. Feb. 10.

Recovery allowed to pass, although the warrant of several vouches was on separate pieces of parchment.

ON the motion of *Peake*, Serjt., and an affidavit that the vouches lived in different parts of the country, the Court allowed this recovery to pass and be recorded as of this term, notwithstanding the warrants of attorney, which were joint and several, were on two separate pieces of parchment. Three commissioners residing in different places were named in the *dedimus potestatem*.

Peake mentioned *Balch v. Phelps*, 3 B. & P. 366, which seemed against his application, but added, that the Court had, on his motion, done the same thing last year. Separate warrants being allowed in real proceedings, it was not easy to see why they should be objected to in fictitious.

TINDAL, C. J. The *dedimus* is addressed to commissioners residing in different places, and they, for convenience, take the warrants on separate parchments. I see no objection on principle. Fist.

*CHARLETON and Another v. MORRIS and BEAVAN, Bail of [427
GREENAWAY. Feb. 10.

The bail consented to the defendant's giving a *cognovit* on such terms as he could obtain from the plaintiff. A *cognovit* was then given in February to pay in May; default having been made in May, the defendant negotiated, but in vain, till June 13th. The bail having been proceeded against without any notice of this negotiation, the proceedings were set aside.

THE bail in this cause consented to a *cognovit* being given "upon such terms as might be agreed on between the plaintiff and defendant;" whereupon Greenaway gave a *cognovit* on the 5th of February, 1829, under which he was to pay a portion of the costs on the 5th of March then next, and the residue, with the debt and interest, in May; and if default were made in either of such payments, the plaintiffs were to be at liberty to sign judgment, and proceed thereupon as they might be advised.

The debt was not paid, and some negotiation took place between the plaintiffs and Greenaway's attorneys for further time; but, the negotiation proving fruitless, judgment was signed against Greenaway on the 13th of June.

On the 30th of June a *ca. sa.* against Greenaway was left in the secondary's office, to be returned *non est inventus*. On the 27th of October and 13th of November two writs of *scire facias* against the bail were left at the office of the

sheriff of Middlesex, with orders to be returned *nihil*. Judgment was signed against the bail on the 26th of November.

Of these proceedings the bail deposed they had no notice, till on the 21st of December last Morris was informed that a writ of execution had been issued against him for the amount of the debt due from Greenaway to the plaintiffs.

On the 22d of December (up to which time the writs of *sci. fa.* had not been *428] filed at the *custos brevium* office) *the bail took Greenaway into custody, and detained him in order to surrender him in discharge of themselves; and, as they deposed, could have done so at any time upon receiving intimation of the plaintiffs' intention to proceed.

Wilde, Serjt., under these circumstances, obtained a rule *nisi* to set aside the two writs of *scire facias*, and the judgment signed thereon. He relied on Clift v. Gye, 9 B. & C. 422, where a plaintiff, with the consent of the bail to the sheriff, having taken a *cognovit*, with a stay of execution for a month, it was held, that although the bail continued liable, the debt not having been paid, yet the plaintiff could not take proceedings against them without giving them notice that the *cognovit* was unsatisfied.

Taddy and Andrews, Serjts., showed cause. Clift v. Gye was a case of bail to the sheriff, and does not apply in the case of bail above, who, after consenting to a *cognovit* on such terms as their principal should agree to, were liable at any time, as much as if no such *cognovit* had been given. After such a concession, they were bound to search for the plaintiffs' proceedings, and cannot complain of want of notice.

TINDAL, C. J. The rule must be made absolute. If the agreement had been that the bail would consent to any terms their principal might make then or afterwards, the case might have been different; though even then it would seem to fall within the principle of that which has been cited. But all the bail agree to here is, a *cognovit* upon such terms as their principal should obtain; *429] that is, upon executing the *cognovit*. If there *were subsequent negotiations, the bail should at least have been informed that they were at an end before the plaintiff proceeded against them.

PARK, J. In Clift v. Gye the defendant was to have time for a month; the responsibility of the bail there was, to perfect special bail; but though time was given for a month, Lord Tenterden held they could not be charged till notice was given that the *cognovit* was unsatisfied.

GASELEE, J. This Court has repeatedly expressed its displeasure at the practice of returning two *nihil*s to a *scire facias*, and then proceeding without notice to the opposite party. The justice of the case is, that the bail should have notice before they are called on in respect of their principal.

BOSANQUET, J., concurring, the rule was made

Absolute.

BARNARD M'CRANDLE v. BARWISE and WARRY. Feb. 10.

Defendant took plaintiff by mistake under a bail recognisance, entered into by a person of the same name, and upon discovering the mistake, discharged him after some little delay; defendant having then pleaded the recognisance in bar to an action of trespass brought by the plaintiff for the imprisonment, the Court refused to strike out the plea.

BARNARD M'CRANDLE being ill and in bed, was, on the 17th July, 1824, arrested on a *ca. sa.* at the suit of Barwise, as the bail of one Elizabeth Meeke, whom Barwise had sued in the King's Bench for a sum of 141*l*.

*430] M'Crandle had never become bail for Mrs. Meeke, *nor had he ever seen or heard of her; and when he was confronted with the clerk of Warry, Barwise's attorney, who had seen Meeke's bail justify, the clerk instantly declared that he was not the man who had justified bail under the name of Barnard M'Crandle.

Upon the clerk's joining M'Crandle in an affidavit to this effect, Warry, on the 13th of August, promised to see his client Barwise immediately, and liberate M'Crandle.

M'Crandle, however, continued in custody, till, on the 26th of August, the matter was laid before Lord Chief Justice Abbott, when, by consent of Warry, he was discharged out of custody.

In August 1828 M'Crandle commenced the present action for trespass and false imprisonment.

The defendants, after the general issue, pleaded, secondly, by way of justification, that the plaintiff had, together with one Pelham Hollis, acknowledged a recognisance of bail in the action against Mrs. Meeke, upon which the *ca. sa.* against him had issued, and that the recognisance was now remaining on the file of the Court of King's Bench.

M'Crandle being advised that he could not safely reply to this plea, obtained leave to postpone putting in his replication till an application should have been made to the Court of King's Bench on the subject of this recognisance.

A rule *nisi* was accordingly obtained in that Court for cancelling the recognisance; but upon cause being shown, Bayley, J., and Littledale, J., the only Judges present, discharged the rule in Michaelmas term last, and intimated that the plaintiff might reply safely, notwithstanding the recognisance.

Upon affidavit of these circumstances,

Adams, Serjt., in this term, obtained a rule calling on the defendants to show cause why their second plea *should not be struck out, and the plaintiff have further time to reply. He moved this on the ground that the plea [*431] was false within their own knowledge, their conduct amounting to an admission that they had no right to detain the plaintiff from the 13th of August, when the mistake they had made was acknowledged and liberation promised, to the 26th of August, when the plaintiff was discharged by the judge.

Wilde, Serjt., (and *Peake*, Serjt., with him,) were to have shown cause, but the Court called on

Adams to support his rule. Unless this rule be made absolute, the plaintiff is without redress; he cannot deny the existence of the recognisance, and it is not allowable to falsify the record by saying that the persons named in it, or either of them, did not become bail for Mrs. Meeke. [TINDAL, C. J. Why cannot the plaintiff reply that he is not the Barnard M'Crandle named in that record?] It is doubtful whether such a replication would be good on demurrer. But the plea is false within the knowledge of the defendants, and where that is the case the Court will strike it out. In *Gully v. The Bishop of Exeter*, 5 Bingh. 45, Best, C. J., laid it down as a principle, that pleas ought to be true; and upon the Court's striking out several impertinent pleas, Borough, J., said, "I am happy at this opportunity of giving a death-blow to a practice which has improperly prevailed for many years, and which I have long discountenanced." In *Whale v. Lenny*, 5 Bingh. 12, the Court refused to permit a defendant to plead inconsistent defences; and here the plea, that the defendants took the plaintiff by virtue of his recognisance, is inconsistent with their admission that he is not the person named in the recognisance.

*TINDAL, C. J. In this case a rule has been obtained, calling on the defendants to show cause why their second plea should not be struck out, [*432] and why the plaintiff should not have further time to reply. It appears that the facts alleged in the second plea, are facts on which the defendants rely, and I am aware of no authority which would justify us in depriving them of that defence. It might have been a different question if the alleged inconsistency of the defence had been brought to our notice upon the rule to plead several matters, as it was in the case of *Gully v. The Bishop of Exeter*, 4 Bingh. 525; but, however we may regret that the plaintiff should be put to difficulties in his reply, we cannot now interfere. It may be worth while, however, for him to consider, whether he may not be mistaken in that view of his case, and, whether, at all events, an action on the case would not lie against the defendants for

keeping him in prison after they knew he was not the person named in the recognisance.

PARK, J., concurred.

GASELEE, J. I am of opinion, that upon this rule we cannot act. In *Gully v. The Bishop of Exeter*, the motion was to discharge the rule for pleading several matters. Where a plea is false on the face of it, the Court has sometimes treated it as a nullity. (a) But the present is clearly not a sham plea.

BOSANQUET, J., concurring, the rule was

Discharged.

Adams then applied for a rule *nisi* to rescind the rule for pleading several matters, but the Court refused it, saying, that the rule had not been abused as in *Gully v. The Bishop of Exeter*.

(a) See *Lamb v. Pratt*, 1 D. & R. 577.

*433]

*GODLEY v. MARSDEN. Feb. 11.

Where a cause was removed from an inferior court after interlocutory judgment, and before inquiry, the Court refused to award a *procedendo*.

INTERLOCUTORY judgment in an action of trespass on the case, in the county court of Yorkshire, had been signed against the defendant in October last for want of a plea, and the cause was set down for inquiry on the 18th of November, but a day or two preceding, the defendant removed it by writ of *pone* into this Court.

Jones, Serjt., obtained a rule *nisi* for a writ of *procedendo*, on the ground that the *pone* was too late after judgment by default. He cited the language of Holroyd, J., in *Walker v. Gann*, 1 D. & R. 769, that "it was a sound and wholesome general rule, that a cause should not be removed from an inferior jurisdiction after judgment had been signed there, and that the rule was particularly applicable where the defendant suffered judgment by default."

Cross, Serjt., who showed cause, relied on *Bevan v. Prothesk*, 2 Burr. 1151, where the Court held that the delivery of a *re. fa. lo.* to the clerk of a county court after interlocutory judgment, and before final judgment, is a stop to all further proceedings in that court. He also referred to *Attenborough v. Hardy*, 4 D. & R. 362, and *Lee v. Goodlad*, 4 D. & R. 350, where the proceedings were removed after interlocutory judgment, and it was never objected that the removal was too late.

*434] *Jones. Although the *pone* may stop proceedings, it is competent to the superior court, upon investigation, to award a *procedendo*. In *Attenborough v. Hardy*, and *Lee v. Goodlad*, the question was not raised; but *Walker v. Gann* is later, and in point.

TINDAL, C. J. This rule must be discharged. The case of *Walker v. Gann* does not apply; for there, not only had judgment been suffered by default, but a jury had found damages upon inquiry, so that nothing remained but the mere form of final judgment. In the present case, there has been no inquiry by a jury. *Cox v. Hart*, 2 Burr. 758, is in point; there, a *procedendo* was refused after interlocutory, and before final judgment, although the plaintiff had gone the length of giving notice of executing a writ of inquiry.

PARK, J. In *Walker v. Gann* the verdict had actually been given, and nothing remained to be done but a mere formal entry. *Cox v. Hart* is decisive.

GASELEE, J. In *Cox v. Hart*, the practice is stated to be to allow the *habeas corpus*, provided it be delivered at any time before the jury is sworn, and that accords with the statute 43 Eliz. c. 5.

BOSANQUET, J., concurred, and the rule was

Discharged.

*SHEPHERD and Others v. Bishop of CHESTER and Others. Feb. 11. [*435]

1. Plaintiffs, as owners of messuages in a chapelry, alleged a right to appoint a curate, in virtue of their being charged annually for the repair of the chapel. The proof being, that the chapel was repaired out of the poor-rate, Held, that the allegation was not sustained.
2. Where the point is reserved at the trial, a nonsuit may be entered on issues found for the plaintiff, notwithstanding there be issues on the same record found for the defendant.

QUARE IMPEDIT. By the first count the plaintiffs, as the *major part* of the owners of messuages, &c., charged with the payment of yearly sums for the repair of Grayrigg chapel in Lancashire, and the support of the licensed curate performing divine service therein, claimed the right of nominating a curate for the said chapel, and of presenting him to the bishop to be licensed.

By a second count they claimed a right to nominate and elect the curate, and to present him to the vicar of the parish for the time being for the approval of such vicar, to be by such vicar presented to the bishop to be licensed.

By a third and fourth counts the same rights were claimed for the owners of messuages; omitting the qualification of the *major part*.

The defendants first took issue on the right in the first count generally; and, secondly, on the allegation that the plaintiffs were the major part of the owners of messuages.

Thirdly, they took issue on the right as alleged in the second count generally; fourthly, on the allegation, that the plaintiffs were the major part of the owners of messuages entitled to the right as alleged in that count; and, fifthly, on the allegation, that the plaintiffs had presented to the vicar for his approbation.

Similar issues were joined on the third and fourth counts.

*At the trial before Littledale, J., last Lancaster assizes, the two first issues were found for the defendants; the third and fourth for the [*436 plaintiffs, and the fifth was abandoned.

The right being alleged in such as contributed to the repairs of the chapel and to the support of the curate, and the evidence tending to show that the repairs of the chapel were paid, not by individuals, but out of the poor-rate, it was contended that the variance was fatal; and upon that and other alleged insufficiency of proof, leave was given to the defendants to move to enter a nonsuit on the issues found for the plaintiffs, or to amend the *postea* by entering a discharge of the jury on those issues, as being immaterial after the issues found for the defendants, and the abandonment of the fifth issue.

Wilde, Serjt., having obtained a rule *nisi* to that effect,

Jones, Serjt., who showed cause, contended, first, that the two issues found for the plaintiffs were not immaterial; for, though the plaintiffs had on the present occasion abandoned the fifth issue touching presentation to the vicar for approval, they might at another time be in a condition to prove it, and then the verdict found for them on the issue showing their right to appoint the curate, subject to such presentation, would be most material.

Secondly, the jury could not be discharged without the consent of the plaintiffs given at the trial; and,

Thirdly, that a nonsuit could not be entered after a verdict had been found for the defendants on any issue.

TINDAL, C. J. That verdict was found subject to leave to move to enter a nonsuit on the issues found for the plaintiffs, in which condition the plaintiffs' counsel acquiesced. If the verdict had been for the defendants generally, the result might have been different; but it was found on one count [*437 only, and the plaintiffs themselves have occasioned the difficulty, which could not have arisen in the old way of pleading, when the plaintiff in *quare impedit* was not allowed to have more than one count. The evidence appeared to the learned Judge who tried the cause insufficient to support the count found in favour of the plaintiffs; it appears so also to us; and it is but just that the plaintiffs should waive that verdict, and that a nonsuit should be entered.

The rest of the Court concurred, and the rule was made

Absolute.

GRYMES v. BOWEREN. Feb. 11.

A pump erected by a tenant during his term, and very slightly affixed to the freehold, is removable as a tenant's fixture.

CASE for injury to the reversion. At the trial before Garrow, B., at the last Norfolk assizes, it appeared that the defendant, who occupied as tenant from year to year certain premises belonging to the plaintiff, had, at his own expense, erected on the premises a pump, which he took away when he quitted them.

The pump was attached to a stout perpendicular plank; this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches. The pin, which had a head at one end and a screw at the other, passed entirely through the wall.

The tube of the pump passed through a brick flooring into a well beneath. *438] This well had originally been open, *but the defendant had arched it over when he erected the pump; and, in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed.

Under the direction of the learned Baron (who thought the pump parcel of the freehold, inasmuch as it could not have been the subject of larceny at common law), the jury found a verdict for the plaintiff, damages 4*l.*, with leave for the defendant to move to enter a nonsuit.

Wilde, Serjt., having obtained a rule *nisi* accordingly,

Storks, Serjt., now showed cause. The general rule is, that what is fixed to the freehold cannot be removed by the tenant without incurring the consequences of waste. The exceptions to this rule have been carefully enumerated by Lord Ellenborough in *Elwes v. Maw*, 3 East, 50, and, as between landlord and tenant, seem resolvable into utensils set up in relation to trade, and matters of ornament, as marble chimney pieces, pier glasses, and the like; and the pump in question does not fall within either of those descriptions. A greenhouse, which has been deemed removable when erected by a nurseryman for the purpose of his trade (per Lord Kenyon in *Penton v. Robart*, 2 East, 88), yet in ordinary cases has been held irremovable. *Buckland v. Butterfield*, 2 B. & B. 54.

Wilde. As between landlord and tenant, the rule with regard to fixtures is less rigid than as between persons standing in any other relation; and custom *439] has introduced another exception. Articles of general utility *and domestic convenience, (a) affixed during the term, have always been holden to belong to the tenant, and are either taken away or valued as between him and the incoming tenant, upon the determination of the term. Such articles are, coppers, ovens, grates, and the like. No doubt a pump might be so imbedded in the freehold as to render its removal improper; but if it be so slightly fixed as the pump in question, and can be moved entire, it falls within the exception of articles, for domestic convenience. If this were a landlord's fixture, the tenant might be precluded from removing even a barometer attached to a wall by a nail.

Suppose the well had been deep, and it had been found convenient to draw the water by means of a steam-engine, would the landlord have been entitled to retain the engine?

TINDAL, C. J. It is difficult to draw any very general and at the same time precise and accurate rule on this subject; for we must be guided in a great decree by the circumstances of each case, the nature of the article, and the mode in which it is fixed. The pump, as it is described to have been fixed in this case, appears to me to fall within the class of removable fixtures. The rule has always been more relaxed as between landlord and tenant, than as between per-

(a) See *Amos on Fixtures*, where all the cases are collected.

sons standing in other relations. It has been holden that stoves are removable during the term; grates, ornamental chimney pieces, wainscots fastened with screws, coppers, and various other articles: and the circumstance that, upon a change of occupiers, articles of this sort are usually allowed by landlords to be paid for by the incoming to the outgoing tenant, is confirmatory of this view of the question.

*Looking at the facts of this case; considering that the article in dispute was one of domestic convenience; that it was slightly fixed; was [440 erected by the tenant; could be moved entire; and that the question is between the tenant and his landlord; I think the rule should be made absolute.

PARK, J. The rules with regard to property of this description vary according to the relation in which parties stand towards each other. The rule as between heir and executor is more strict than as between landlord and tenant, and even as between landlord and tenant it has been relaxed in modern times; for in *Lawton v. Lawton*, 3 Atk. 13, Lord Hardwicke held, that wainscot might be removed by the tenant, although it would have been waste to have removed it in the time of Hen. 7.

Perhaps we ought not to look with too much nicety as to the mode in which articles are fixed, when it has been holden that the tenant may remove ovens, coppers, and the like. The present case, however, is clearly distinguishable from *Buckland v. Butterfield*, where a conservatory was deeply fixed in the soil, and formed part of the house to which it was attached; and, however I may regret it, seeing that the value in dispute is so small, I am compelled to say that the verdict which has been given is wrong.

GASELEE, J., concurred.

BOSANQUET, J. I am of opinion, that this pump was removable by the tenant. Whether property of this kind be removable or not, depends in some degree on the relation between the parties: and in the relation of landlord and tenant the rule is less strict than in others: *it is more so as between heir [441 and executor, and as between executor and remainder-man. My apprehension has been lest we should be thought to lay down any principle which would apply to cases different from the present. But considering that this is a case between landlord and tenant; that the pump was erected by the tenant; that it is an article of domestic use; and can be removed entire; I think the verdict ought to be set aside.

Rule absolute.

ADCOCK v. FELTON. Feb. 12.

Return, "next after fifteen days of St. Hilary," irregular.

AN attachment of privilege had issued in this cause on the 29th of January, returnable on Wednesday next after fifteen days of St. Hilary.

Storks, Serjt., obtained a rule nisi to set it aside for various irregularities: and, among others, because there was no such return day as Wednesday next after fifteen days of St. Hilary.

"In fifteen days of St. Hilary," would have been Wednesday the 27th of January. The Wednesday next after, was the 3d of February, legally styled the Morrow of the Purification. As to which,

Jones, Serjt., who showed cause, answered, that an attachment of privilege must be made returnable on a day certain, and not on a general return day *eo nomine*; but that the general return day might be taken for the day certain as well as any other, provided its style, as a general return day, were not adopted. The plaintiff, *therefore, would have been irregular if he had made his writ returnable on the Morrow of the Purification *eo nomine*, because [442 that was the style of the day in its quality of a general return day; but he was

regular, and showed that he meant to employ it as a day certain, by styling it the Wednesday after fifteen days of St. Hilary.

TINDAL, C. J. The return is irregular. It has always been the practice to reckon from one return day to the next ensuing, and then to commence a fresh computation. Parties ought to pursue the old course, and not introduce new terms, which may tend to perplex.

Rule absolute.

RUSSELL v. DICKSON. Feb. 12.

The Court will not take judicial notice of the sheriff's book.

JONES, Serjt., on the part of one of the bail, moved to set aside a *cognovit*, and *ca. sa.* in this cause, for irregularity, on an affidavit that the damages laid in the declaration were 300*l.*; and that the *cognovit* was given for 500*l.*, conditioned for payment of 250*l.* 17*s.*, and 28*l.* 18*s.*, and, that by the writ of *ca. sa.* as appeared by an entry in the book kept at the office of the sheriff, the sheriff was commanded to take the defendant to satisfy 404*l.* 11*s.* damages recovered by the plaintiff.

It appeared that the *cognovit* had been sanctioned by the bail themselves, who had signed a consent that it should not exonerate them from their liability; and the only question was, Whether the sheriff's book was sufficient evidence of the irregularity in the amount of the *ca. sa.*

*413] *Wilde*, Serjt., who showed cause, contended, that the sheriff's book was not a public document, but a mere memorandum, and no evidence when the writ itself might have been inspected.

Jones urged, that upon motions supported by affidavit the same strictness was not observed with regard to evidence as in trials at *Nisi Prius*, and the party might not be able to obtain the writ.

TINDAL, C. J. The question is, Whether we are to take judicial notice of the sheriff's book. That may show one thing, and the writ another. The party might have gone to the office, and have ascertained whether the writ was returned.

Rule discharged.

GREEN v. POLE. Feb. 12.

Plaintiff, who had taken a verdict subject to an award under an order of *nisi prius*, after the case had been heard, and just before the award was about to be made, revoked the arbitrator's authority, with circumstances savouring of *mala fides*, and gave fresh notice of trial. The order of *nisi prius* not having been made a rule of court, the Court refused to stay proceedings.

By an order of *Nisi Prius*, and with the consent of all parties, a verdict was taken in this cause for 1000*l.* damages, subject to the award of a barrister.

Before the arbitrator made his award, the plaintiff revoked his authority by deed, and gave notice for trial at the sittings in this term.

At the time of the revocation, the order of *Nisi Prius* had not been made a rule of Court.

Taddy, Serjt., therefore, on the part of the defendant, obtained a rule *nisi* to *444] stay the proceedings till the Court should further order, upon an affidavit, which stated, that after all the evidence had been gone through on both sides, at great length, before the arbitrator, the 8th of December last was fixed for the counsel to sum up the case, and that the plaintiff revoked the arbitrator's authority, without any application to postpone that meeting for the purpose of obtaining witnesses in reply to the defendant's case.

In answer to this the plaintiff's attorney deposed, that at the last meeting previous to the 8th of December, the plaintiff's counsel stated, that evidence would be adduced to contradict the defendant's case; that application was afterwards made to six individuals, who were able to give material evidence for the plaintiff, and to contradict and discredit certain of the defendant's witnesses; and that in consequence of their refusal to attend the arbitrator, the plaintiff revoked his authority.

Wilde and *Andrews*, Serjts., who showed cause, contended, that the revocation of the arbitrator's authority was no ground for staying the proceedings, particularly as the order of *Nisi Prius* was not made a rule of Court; *Clapham v. Higham*, 1 Bingham 87.

Tuddy urged the *mala fides* of the plaintiff. It appeared, on his own showing, that his witnesses had refused to attend the arbitrator, which could only have arisen from their inability to establish his case.

TINDAL, C. J. We have every inclination, if we had the power, to make this rule absolute; but we have no power to do so. All who submit to arbitration have the right to revoke the arbitrator's authority before the award is made. The only way of deterring them, is, by making the order of *Nisi Prius* a rule of Court, when the fear of an attachment may induce them to submit.

Rule discharged.

BOOTH and Another v. MIDDLECOAT and Others. Feb. 12.

One of several defendants in an action of debt having pleaded bankruptcy, plaintiff entered a *nolle prosequi* as to him:

Held, that such defendant was not entitled to his costs under 8 Eliz. c. 2, although before plea the plaintiff was apprised of the bankruptcy.

DEBT on a bail-bond.

As soon as an appearance had been entered, and before plea pleaded, the attorney of the defendant Middlecoat told the plaintiff's attorney that Middlecoat was a bankrupt and had obtained his certificate. The plaintiff's attorney took no step to discharge Middlecoat, who thereupon pleaded his bankruptcy and certificate, and ruled the plaintiffs to reply; whereupon a replication was filed as to the other defendants, and a *nolle prosequi* entered as to Middlecoat.

Russell, Serjt., obtained a rule *nisi* for the plaintiffs to pay Middlecoat his costs of this action under the statute 8 Eliz. c. 2, s. 2, which gives a defendant his costs in case a plaintiff after declaration suffer a suit to be discontinued, or otherwise be nonsuited in the action.

In the case of *Cooper v. Tiffin*, 3 T. R. 511, in which the plaintiff, after declaration, discovering that the defendant was an infant, entered a *nolle prosequi*, the Court on argument said, "That the case of *nolle prosequi* could not be distinguished in reason from that of a discontinuance, for that in this, as well as in that, the party might afterwards commence another action for the same cause; and *that the practice had been to give costs in such cases." And though in *Harewood v. Matthews*, 2 Tidd. 981, 9th edit., the Court refused the defendant his costs on a *nolle prosequi*, the plaintiff there had no notice, as in the present case, of the defendants' non-liability before plea pleaded. In *Jackson v. Chambers*, 8 Taunt. 643, the defendant was allowed her costs under the statute, 8 Eliz. c. 2, s. 2, although, upon the argument, *Vaughan*, Serjt., cited the case of *Harewood v. Matthews*.

Wilde, Serjt., showed cause. A defendant who is discharged neither by discontinuance nor nonsuit, may sometimes be within the equity of the statute; as, if he were never liable to the action; which was the case of the infant in *Cooper v. Tiffin*; but if he be *prima facie* liable, and his plea is a defence arising since he incurred the obligation on which he is sued, he is not entitled to his costs upon a *nolle prosequi*, at least in actions on contract; and *Harewood*

v. Matthews is in point. Cases in tort are essentially different, because there one joint wrong-doer cannot levy contribution of the others; and this explains the decision in *Jackson v. Chambers*, which Dallas, C. J., distinguished also on another ground from *Harewood v. Matthews*.

Russell. In the present case, the plaintiff having had notice before plea pleaded that the defendant was not liable, and yet having unnecessarily compelled him to incur the expense of pleading, the case is the same as if the defendant had never been originally liable.

TINDAL, C. J. I think this case is not within the principle of the 8 Eliz. c. 2, s. 2, which gives a defendant his costs, in case a plaintiff after declaration *447] suffer a suit to be discontinued, or be otherwise nonsuit in the *action. It has been said, that in some cases a *nolle prosequi* is within the equity of this statute: that is, where what has been done amounts to a discontinuance or a general nonsuit. We do not impeach the decision of *Jackson v. Chambers*, where there were several defendants in trespass, and the one in whose favour a *nolle prosequi* was entered, would have no means of obtaining costs against the others: but we accede to the practice as laid down in *Harewood v. Matthews*, and neither on the particular circumstances of the case, nor under the equity of the statute do we think the defendant entitled to his costs.

PARK, J. It is impossible to distinguish *Harewood v. Matthews*, which has decided the present case.

Rule discharged.

DOE dem. HOLT and Others *v.* ROE. Feb. 12.

1. D. having given a *cognovit* for 357*l.*, mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same.

The mortgagee having levied execution, her right to the goods seized was disputed in an action at the suit of certain persons, who claimed to be assignees of D. under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, D. proving not to be bankrupt:

Held, that the mortgagee could not claim from D. the costs of this action, as costs or charges attending the judgment confessed by D.

2. D. having stated at the execution that certain goods levied were not his property, and the sheriff having, by inquiry, ascertained that they were, the mortgagee was holden entitled to claim of D. the costs of the inquiry, if she had paid them to the sheriff.

ONE Dally being indebted to Rebecca Holt, the lessor of the plaintiff, gave her a *cognovit* for 357*l.* 18*s.*, with a stay of execution till November 1825.

*448] *Upon an application for further time to pay, he, by indenture, demised to her the premises sought to be recovered in this ejectment, for ninety-nine years, with a proviso for making void the indenture upon payment of the before-mentioned debt and interest by instalments, without any deduction or abatement whatsoever; the first instalment to be paid in August 1826. The indenture also contained a covenant by Dally, that, after default made in such payment, it should be lawful for the said Rebecca Holt and Robert Rees to enter into the said premises and quietly possess and enjoy the same; and for further assurance by Dally, it was further declared that it should be lawful for the said Rebecca Holt and Robert Rees to enter up judgment on the said *cognovit* signed by Dally, and that such judgment, when so entered up, should stand and be as a security for payment of the said sum of 357*l.* 18*s.* with interest, and costs; and that in case default should be made in payment of the said sum of 357*l.* 18*s.*, or the interest as aforesaid, or any part thereof as therein mentioned, it should be lawful for the said Rebecca Holt and Robert Rees to issue execution on the said judgment, and thereunder from time to time to levy, until the whole of the said sum of 357*l.* 18*s.* and interest should be fully paid and satisfied, together with the costs of such judgment, and all other costs and charges whatsoever attending the same.

In October 1826 (the first instalment due in August not having been paid)

Holt issued a *fi. fa.* under the judgment on the *cognovit*, for 315*l.* 12*s.* 7*d.*, the balance then due to her out of the 357*l.* 18*s.*

The 315*l.* 12*s.* 7*d.* was levied by the sheriff, and paid to Holt; but Dally having given the sheriff notice that the goods seized belonged jointly to him and one Deacon, the sheriff impanelled a jury to determine the question of property, and the expense of that inquiry amounted to 20*l.*

*A commission of bankruptcy having been issued against Dally about this time, his assignees sued Holt for the money levied on Dally's goods [449 and paid her by the sheriff, and on the trial of the cause a verdict was found for the assignees.

This verdict was set aside on a motion for a new trial, and Holt having taken the record down by proviso to a second trial, a verdict was there given in her favour, and, on a special case, confirmed by the Court of King's Bench, on the ground that Dally was not a trader.

The costs of this second trial were paid her by Dally's assignees; but the costs of the first trial, the costs of taking down the record by proviso, and the costs of the inquiry by the sheriff to ascertain whether the goods he had seized belonged to Dally or to Dally and Deacon, amounting altogether to 220*l.*, remained unpaid.

The lessors of the plaintiff, therefore, commenced this ejectment, considering these as "costs and charges attending the judgment," as a security for which the premises in question had been demised to them by Dally.

Wilde, Serjt., on the part of Ridge, the tenant in possession, who had entered into the consent rule to defend, and to whom Dally had conveyed the equity of redemption, obtained a rule *nisi* calling on the lessors of the plaintiff to stay the proceedings, and assign the premises to Ridge at his expense, upon the ground that the judgment under the *cognovit*, and all costs attending it, had been discharged by the levying of the 315*l.* 12*s.* 7*d.*, and the payment of the costs in the second trial in the action brought by Dally's assignees. He contended that the costs of an action brought by strangers, who ultimately appeared to have no valid claim upon the effects of the mortgagor, were no part of the costs *and charges attending the judgment confessed by the mortgagor. [450 The inquisition under the execution upon that judgment was holden by the sheriff for his own safety, and he therefore, not the mortgagor, ought to defray the expense of it.

Taddy, Serjt., who showed cause, urged that the inquisition having been rendered necessary by the mortgagor's asserting that the goods did not belong to him, he was estopped to say that the expenses attending it were not costs attending the judgment he had confessed. So, the action of the assignees was a contest occasioned by the judgment the validity of which the mortgagor was bound to support; the charges of that action, therefore, were charges attending the judgment.

Wilde. The mortgagor having turned out not to be a bankrupt, has no connexion with the action of his supposed assignees; they defrayed the costs of the second trial, on which the mortgagees succeeded; it may be presumed, therefore, to have been by her own default that she failed on the first; and, at all events, costs occasioned by her own default cannot be esteemed costs attending the judgment confessed by the mortgagor.

TINDAL, C. J. It appears to me that the costs of the action brought by the assignees are not costs secured by the instrument which the mortgagor has executed. That was an action brought by strangers; and if it had been met with a good defence at first, as it was ultimately, the costs now sought would not have been unpaid. The costs of the inquisition may be left to the prothonotary.

GASELER, J. Whatever portion of the costs of the sheriff's inquisition was paid by the lessor of the *plaintiff, I think she is now entitled to. If [451 they were defrayed by the sheriff, she cannot claim them.

The rest of the Court concurred.

Rule absolute, upon payment of such portion of the costs of the inquisition, if any, as the prothonotary should think right.

RUTHERFORD v. EVANS. *Feb. 12.*

1. Libel. The declaration alleged, that the plaintiff had been appointed as surveyor of a company or society, called "The New England Company;" and had been employed as such; and that defendant libelled him in his employment.
Held, that it was not necessary to allege, with extreme precision, the description of the company, or to prove the plaintiff's appointment, the libel being alleged of the plaintiff in his employment.
2. The libel charged plaintiff with being the most artful scoundrel that ever existed, and with being insolvent; but the writer added, that he had never disclosed the matter, nor ever would, except to the person whom he addressed and his friend. This latter assertion was omitted in the declaration: Held, that the omission was not material.

THE first count of the declaration stated, That the plaintiff, for a long time before and at the time of the composing and publishing the false, scandalous, malicious, and defamatory libel by the defendant thereafter mentioned, and before and at the time of the committing of the several grievances by the defendant thereafter mentioned, carried on the trade and business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward of a certain company or society of persons called the New England Company, and in such capacity had been and was employed by the said company, and had always conducted himself with credit, skill, care, punctuality, fidelity, and
*452] integrity towards the said company, and all *others employing him in the way of his said trade and business, and until the committing of the said several grievances by the defendant thereafter mentioned, had never been suspected of being guilty of any extravagance or misconduct in his said employment by the said company, or of abusing the trust or confidence reposed in him by the said company in his said employment, or of having made default in payment of the moneys due and owing from him to his several creditors, or of being in insolvent circumstances, but was of good name, fame, and credit, and was gaining great profits in his said employment by the said company and by his said trade and business, to the comfortable support of himself and his family, and the great increase of his riches, to wit, at London: Yet the defendant well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with the said company, and with and amongst his said employers, and all his neighbours and other good and worthy subjects of his kingdom, and to cause it to be suspected and believed by the said company, and by and amongst his employers and neighbours and the said subjects, that he had been and was guilty of the offences and misconduct therein after mentioned to have been charged upon and imputed to him, and to cause the said company to dismiss and discharge him from their said employment, and thereby to injure him in his said business and employment, and to vex, harass, oppress, impoverish, and wholly ruin him, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the said plaintiff, and of and concerning his said business and *employment by the said company, and of
*453] and concerning the plaintiff in his said trade of carpenter, builder, and surveyor, and of and concerning an alleged default in payment of the moneys due and owing from the said plaintiff to his said several creditors as aforesaid, a certain false, scandalous, malicious, and defamatory libel, in the form of a letter addressed to one James Gibson, he the said James Gibson then and there being the treasurer of the said company, containing amongst other things the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning his said business and employment by the said company, and of and concerning his alleged default in payment of the moneys due and owing from the said plaintiff to his said several creditors as aforesaid, that is to say, "I (meaning the said defendant) should have been silent notwithstanding my anxious desire to put you (meaning the

said James Gibson) upon your guard against the most artful scoundrel (meaning the plaintiff) that ever existed: the natural punishment of his extravagance and misconduct is fast approaching, he is in every person's debt, his ruin cannot be long delayed, and he is not deserving of the slightest commiseration.

The libel proved in support of this declaration, was a letter from the defendant, as follows, addressed to the treasurer of the New England Company, by whom the plaintiff had been employed.

"My dear Sir,

"I was very sorry to find by your letter received to-day, that you had been so uncomfortably circumstanced respecting the information I gave you previously to your leaving Eveswell. I fully expected our friend would have seen you soon after, or I should have been silent notwithstanding my anxious desire to put you upon *your guard against the most artful scoundrel that ever existed. The natural punishment of his extravagance and misconduct [454] is fast approaching: he is in every person's debt. His ruin cannot be long delayed; and he is not deserving of the slightest commiseration. But it is my most anxious request that this fellow's misconduct may not entail ruin in another quarter. Were I to be the cause of such disaster and destruction to so many that are innocent, I could never forgive myself; and I pledge my sacred word of honour that, excepting to you and to our friend, I have never disclosed the affair, nor ever will. If you can inform me when our friend is to be in London, I will meet him, as I had much rather we talk the subject over before any steps are taken.

"I am, &c.,

"E. EVANS."

"Eveswell, 24th October, 1827.

The plaintiff was turned out of his employment, and commenced this action.

At the trial before Tindal, C. J., London sittings after Trinity term, the name of the company, which was a corporate body, commonly called "the New England Company," turned out to be, not "the New England Company," but "A Company for establishing Christianity in New England and the parts adjacent in America." And the plaintiff's appointment as agent and surveyor to the company was not by deed.

It was objected, that the company had not been truly described in the declaration; that the plaintiff had not proved any appointment, inasmuch as appointments by a corporation ought, with few exceptions, to be by deed; and that the letter complained of had not been truly set out in the declaration.

A verdict, however, was taken for the plaintiff, subject to a motion on these points.

**Taddy*, Serjt., accordingly moved in Michaelmas term to set aside [455] the verdict, and enter a nonsuit on the foregoing objections.

With regard to the appointment, he cited *Randle v. Deane*, 2 Lutw. 1497, to show that, except for inferior purposes, as cooking and the like, an officer of a corporation could only be appointed by deed; and proof of the appointment was material to the plaintiff's case, his dismissal being the principal ground of action. In *Moises v. Thornton*, 8 T. R. 303, where the defendant slandered the plaintiff by saying, "If Dr. Moises shows you a diploma, it is a forgery," it was holden, that the production of the diploma was not sufficient to show that the plaintiff was entitled to the degree of doctor of physic. And in *Smith v. Taylor*, 1 N. R. 210, which was an action for slandering the plaintiff in his practice as a physician, Rooke, J., and Chambre, thought he could not recover unless he showed himself to be a physician duly appointed. With respect to the libel itself, the variance was fatal, the part of the letter omitted having the effect of qualifying the whole, and showing, at least, that it was a confidential communication. A rule nisi having been granted,

Wilde and Storks, Serjts, showed cause. If the plaintiff had undertaken to state any deed or contract of the corporation, he might perhaps have been called on to describe the name of the corporation with precision; but when the suit does not concern any contract, and the society is only incidentally mentioned,

it is sufficient to describe them by the name by which they are generally known, otherwise the plaintiff might be placed unnecessarily under insuperable difficulties. With regard to the appointment, it may be contended that the plaintiff's office was one of those to *which a corporation may appoint without a deed, because it neither vests nor divests any interest, Anon, 1 Salk. 191; but the mode of appointment was immaterial, for the libel is not concerning the appointment of the plaintiff, but his employment; and the fact of the employment being out of dispute, if the defendant were deprived of that by reason of the libel, every material allegation in the declaration is proved. The portion of the letter omitted in the declaration by no means qualifies or alters the nature of the libellous extract set out; and the rule is clear, that unless the part omitted alter the nature of the libel it need not be set out. *Cartwright v. Wright*, 5 B. & A. 615, *Tabart v. Tipper*, 1 Campb. 350.

Taddy, (and *Merewether*, Serjt., was with him,) *contra*. The objection with respect to the description of the company is, not that the mere name has been misstated, but that the company has been described as a private society, rather than as a corporate body, so that the proof did not correspond with the description. The plaintiff was never employed by a private society such as that described. Then, the portion of the letter not set out was most material to the construction of the whole, as showing that the communication was made in confidence, and not with any design to injure the plaintiff. In *Tabart v. Tipper*, the passage omitted was an aggravation, not a mitigation of the libellous charge.

Cur. adv. vult.

TINDAL, C. J. This was an action on the case for a libel, in which the plaintiff stated in the first count of his declaration, that before and at the time of the publication of the libel, he carried on the trade and business of a carpenter, builder, and surveyor, and had been *appointed the surveyor, agent, and steward of a certain company or society of persons called the New England Company, and in such capacity had been and was employed by the said company; and he then alleged, that the defendant, intending to cause the said company to dismiss and discharge the said plaintiff from his said employment, &c., published the libel in question of and concerning the said plaintiff, and of and concerning his said business and employment by the said company, in the form of a letter addressed to the treasurer of the said company, containing the libellous matter following of and concerning the said plaintiff, and of and concerning the said business and employment by the said company; which libel is then set out in the declaration.

Three objections were taken at the trial: first, that the plaintiff had failed in proving the inducement to his declaration, for that the proper name of incorporation of the company was not simply the New England Company, but "A Company for establishing Christianity in New England and the parts adjacent in America:" the second, that as the plaintiff alleged an appointment by the company as surveyor, agent, and steward of the company, he was bound to show an appointment by deed under their common seal: and the third objection was upon the ground of a variance from the libel as set out in the declaration, and as proved in evidence.

With respect to the first objection, however, we are of opinion that, as it was proved by the plaintiff that the company was commonly known and designated by the name of the New England Company, it was a sufficient description in this case. It is not an allegation of any right to land or other property, either conveyed to or derived from the company, or of any deed under their common seal; in which case a description by their name of incorporation would undoubtedly have been necessary to enable them to take, to grant, or to charge.

*It is only an allegation of an employment by a company, called the New England Company; and as there was sufficient evidence that the company in question was generally known by that description, we think it sufficient in this action, which is brought for a purpose collateral to any right belonging to the company itself.

As to the second objection, it is to be observed that the inducement states, as separate facts, and as distinct allegations, "that the plaintiff had been appointed the surveyor, agent, and steward of the company," and "that in such capacity he had been and was employed by the said company;" so that the allegation of the appointment and the employment stand distinct from each other. And it further appears that in the averment of the defendant's intention, and also of the application of the libel, the reference is made not to the appointment of the plaintiff to his office, but solely to his employment in that capacity. Even if the declaration had alleged the libel to have been published of and concerning the appointment and also the employment, it would have been difficult to have contended after the decided cases on this point,^(a) that the evidence as to the employment alone would have been sufficient to support the action; but severed as these allegations are, and confined as the libel is to the plaintiff's employment only, we think it unnecessary to prove any actual appointment of the plaintiff to the office in question either by deed or otherwise.

As to the third objection, we take the rule to be as it is laid down in the books—that if the omission of any part makes a material alteration in the sense of the part inserted, such omission is fatal. And if in this case the part of the letter which had been omitted had contained *any qualification of the [*459 meaning of the part set out, or if any real substantial difference of construction would have arisen upon the whole of the letter when set out on the record, we should have held the omission of such part constituted a variance which might be taken advantage of by the defendant. But, upon the consideration of the whole letter, it appears to us that the charge imputed by it remains precisely the same as that which is contained in the part set out. The previous part of the letter, which is omitted, merely assigns the defendant's reason for writing the letter: it has no bearing whatever upon the nature of the imputation, nor does it in any degree alter its quality or effect. If the setting out the whole letter would have enabled the defendant to have moved in arrest of judgment, no doubt the omission of any part would have been a fatal variance. But we think the very same libel appears from the perusal of the whole as from the part; and the consequence is, that although the defendant might undoubtedly avail himself of the whole of the letter as evidence for the jury to infer the want of malice in the defendant, as was done at the trial, still the omission of such part cannot be considered as a ground of variance. We therefore think, the rule should be discharged.

Rule discharged.

(a) See *Figgins v. Cogswell*, 3 M. & S. 369, and *May v. Brown*, 3 B. & C. 113.

*GODEFROY v. DALTON, Gent. Feb. 12

[*460]

an attorney, with the advice of counsel, produced, in an action against J. B. for negligence in the conduct of plaintiff's defence to another action, the prothonotary's book to prove an allegation, "that in consequence of the negligence of J. B. judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed and execution issued;" whereupon, plaintiff was nonsuited for not producing the record of that judgment or a proper copy: Held, that this was not such negligence as rendered the attorney liable to an action.

THE first count of the declaration stated, That whereas before the making of the promise and undertaking of the defendant thereafter next mentioned, a certain action had been commenced and prosecuted by and at the suit of Stephen Dubois against the plaintiff in the Court of our lord the king, before the Justices of our lord the king of the Bench at Westminster, in the county of Middlesex, for a certain cause of action alleged to have accrued to the said Stephen Dubois against the plaintiff, and the plaintiff had retained and employed one Cyrus Jay and Mather Byles as his attorneys, for certain fee and reward to be paid to them by the plaintiff in that behalf (they the said Cyrus Jay and Mather Byles then and there being attorneys of the said Court of our said lord the king of the Bench at Westminster afore-

said) to defend the said action for the plaintiff, and the said Cyrus Jay and Mather Byles had undertaken such defence for the plaintiff, and such proceedings were thereupon had in the same Court in the said action, that it was considered and adjudged by the said Court, that the said Stephen Dubois should recover against the plaintiff the sum of 30*l.* 10*s.* of lawful money of Great Britain, which said sum of 30*l.* 10*s.* the plaintiff had been forced and obliged to pay and had paid to the said Stephen Dubois in satisfaction of the said judgment, and had been desirous of commencing and prosecuting a certain action against the said Cyrus Jay and Mather Byles for negligence in conducting his said defence and for the recovery *461] of the said sum of 30*l.* 10*s.* so paid to the *said Stephen Dubois as aforesaid; of all which said several premises the said defendant, before the making of his said promise and undertaking thereafter next mentioned, had notice, to wit, at, &c., and thereupon, theretofore, to wit, on, &c., at, &c., in consideration that the plaintiff, at the special instance and request of the defendant, would retain and employ the defendant as his attorney for certain fee and reward to be thereupon paid by the plaintiff to the defendant in that behalf, to prosecute and conduct the said action of the plaintiff against the said Cyrus Jay and Mather Byles, the defendant undertook and then and there faithfully promised the plaintiff to prosecute and conduct the said last-mentioned action, in a proper, skilful, and diligent manner: and the plaintiff confiding in the said promise and undertaking of the defendant, and in hopes of his faithful performance thereof, did afterwards, to wit, on, &c., at, &c., retain and employ the defendant as such attorney as aforesaid, to prosecute and conduct the said last mentioned action on the term-aforesaid; and the defendant then and there accepted the said retainer and employment, and under and by virtue thereof, afterwards, to wit, in Trinity term in the seventh year of the reign of our said lord the king, as the attorney of and for the said plaintiff, commenced an action at the suit of the plaintiff against the said Cyrus Jay and Mather Byles in the said Court of our said lord the king, before the Justices of our said lord the king of the Bench at Westminster, for the purpose aforesaid: and afterwards, to wit, on, &c., at, &c., the said Cyrus Jay and Mather Byles appeared and pleaded to the said action, and issue was joined thereupon: and afterwards, to wit, on, &c., at, &c., the said last-mentioned cause came on for trial in the said Court of our said lord the king of the Bench, before Sir James Burrough, Knight, in the absence of the Right Honourable Sir William Draper Best, Knight, his Majesty's Chief Justice of the said Court of the *Bench, he, the said Sir James Burrough, *462] being then and there one of the Justices of the Bench, and was then and there tried before the said Sir James Burrough: and, although it was then and there the duty of the defendant under and by virtue of his said retainer, and his said promise and undertaking, to have had in the said Court of our said lord the king of the Bench at the trial of the said last-mentioned action, evidence of the said judgment in the said first-mentioned action against the plaintiff at the suit of the said Stephen Dubois, in order that it might then and there have appeared to the said Court of our said lord the king of the Bench, that judgment had been obtained by the said Stephen Dubois against the said plaintiff in the said first-mentioned action for the said sum of 30*l.* 10*s.*, whereof the defendant had notice, nevertheless, the defendant, not regarding his said promise and undertaking, but contriving, and fraudulently intending, to injure the said plaintiff in this respect, did not nor would prosecute the said last-mentioned action in a proper, skilful, and diligent manner, but on the contrary thereof wholly neglected and omitted to have proper evidence of the said judgment in the said first-mentioned action ready to produce to the said Court of our said lord the king of the Bench; by reason whereof, the plaintiff was then and there wholly unable to prosecute his said action against the said Cyrus Jay and Mather Byles with effect, and was then and there compelled to suffer himself to be nonsuited in the said last-mentioned action, whereby he was not only hindered and prevented from recovering from the said Cyrus Jay and Mather Byles the said sum of 30*l.* 10*s.* so paid to the said Stephen Dubois as aforesaid, in satisfaction

of his said judgment, but had also been forced and obliged to pay and had paid to the said Cyrus Jay and Mather Byles a large sum of money, to wit, the sum of 100*l.* for their costs and charges in and about their defence to the said last-mentioned *action; and had also been forced and obliged to incur a further great expense, amounting in the whole to 100*l.*, in and about re- [*463 commencing and prosecuting his said action against the said Cyrus Jay and Mather Byles, to wit, at," &c.

The present action was brought by the plaintiff against the defendant, as an attorney of this Court, for negligence in the conduct and prosecution of a former action brought by the same plaintiff against Cyrus Jay and his partner.

The action against Jay and his partner had been brought against them for negligence, as attorneys, in conducting the defence of the present plaintiff in a former action, which had been brought against him by one Dubois: and in the action against Jay and his partner, the declaration alleged that, by reason and in consequence of the negligence of Jay and his partner, judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed, and execution issued against Godefroy.

Upon the trial of *Godefroy v. Jay and Another*, before Burrough, J., the only evidence which the present defendant had procured to satisfy that allegation was the book of the prothonotary of this Court, in which was kept an entry of the judgments by default, signed in each term, with the date, and the officer's fees opposite to the same; and the learned Judge who tried that cause, held this proof of the allegation not to be sufficient, and nonsuited the plaintiff; which judgment of nonsuit was afterwards confirmed by this Court on a motion to set aside the same. It was for the negligence on the part of Dalton, as the plaintiff's attorney, in not having provided himself with the proper evidence of the judgment as set out in the declaration against Jay and his partner, that the present action was brought.

It was proved, by a gentleman at the bar, of great *experience and skill, that, upon the particular allegation in that declaration against Jay [*464 and his partner, he thought, at the time, the evidence offered was sufficient; for that it seemed to him that negligence was the gist of the action, and that the judgment was only alleged as the consequence. But it appeared that the defendant Dalton had consulted this gentleman just before the trial of *Godefroy v. Jay and Another* was called on, and it was not shown that he had ever searched to find whether final judgment had been entered up or not in the cause of Dubois v. Godefroy.

At the trial of the present cause before Tindal, C. J., Middlesex sittings after last Trinity term, a verdict was taken for the plaintiff, subject to a motion to this Court to set it aside, and enter a nonsuit or arrest the judgment. Accordingly,

Taddy, Serjt., in Michaelmas term obtained a rule nisi to that effect, on the ground that the defendant in the exercise of his profession was liable only for the consequences of gross negligence, and not for a mere error in judgment; for which he cited *Pitt v. Yalden*, 4 Burr. 2060, where Lord Mansfield had placed the question of professional responsibility on that footing; and he contended that nothing more than an excusable error in judgment had been proved against the defendant. An arrest of judgment was moved for on the ground that the record nowhere alleged the plaintiff to have had a good cause of action against Jay and Byles, or that Dubois had originally no cause of action against the plaintiff; and unless he had a good cause of action against them, as having been injured by the judgment suffered to Dubois, he could not recover against the present defendant; but as the Court came to no decision on this point, the argument upon it is here omitted.

**Wilde* and *Bompas*, Serjts., showed cause. It may be admitted that an attorney is not liable, if he errs in judgment upon a point of doubt or difficulty; but he is responsible for the consequence of not being reasonably [*465 vermed in his business, and for neglect in the conduct of it. And where gross

ignorance is proved, it is no answer for the defendant to say he consulted another, for he is bound to possess reasonable skill in his business, and he cannot shift his own responsibility.

The ignorance by which the plaintiff has suffered was in a matter of everyday practice. The declaration had alleged that a judgment had been obtained against the plaintiff through the negligence of Jay and Byles; unless that judgment were proved to exist the plaintiff had no cause of action against Jay and Byles. But it is among the first elements of legal knowledge and practice that a final judgment ought to be proved by the production of the record or an office copy; and the defendant ought at least to have ascertained whether or not the final judgment existed, and to have consulted his counsel before the very eve of the trial.

Taddy and Cross, Serjts., contrd. The gist of the plaintiff's charge against Jay and Byles was, that through their negligence judgment by default had been signed against him; the final judgment was only alleged as a consequence of that negligence. The defendant Dalton, therefore, might be excused for supposing, sanctioned as he was by counsel, that the interlocutory judgment was all he would be called on to prove; and of that, till the Court had decided otherwise, the prothonotary's book might be thought good, if not the best evidence. Gross negligence in an attorney, can only be of that which is his immediate duty, uncorrected by superior advice,—as, an omission in the stating an abstract; but this was a case of novelty in which the defendant might well seek for assistance, and might well stand excused *where one of higher attainments had fallen into error. In *Compton v. Chandless*, cited in *Baikie v. Chandless*, 3 Campb. 19, Le Blanc, J., said, "That it was not every neglect that would subject a man to such an action; that an attorney was only bound to use reasonable care and skill in managing the business of his client; that if he were liable further, no man would venture to act in that capacity;" which was confirmed by Lord Ellenborough in *Baikie v. Chandless*, 3 Campb. 19, who said, that "An attorney is only liable for *crassa negligentia*; and it is impossible to impute that to the defendant for not discovering a defect in the memorial of an annuity, which was subsequently held to be a defect upon a very doubtful construction of the statute. I perfectly agree in the observations made on a similar occasion by my brother Le Blanc; and I am of opinion that the present action cannot be maintained."

Cur. adv. vult.

TINDAL, C. J. In this case the defendant obtained a rule to show cause why the verdict for the plaintiff should not be set aside, and a nonsuit be entered, or, why the judgment should not be arrested: but as the opinion which the Court has formed upon the first branch of the rule, involves the whole merits of the action, it becomes unnecessary to discuss the objection which is supposed to exist upon the record.

It was an action of assumpsit brought by the plaintiff against the defendant, as an attorney of this Court, for negligence in the conduct and prosecution of a former action brought by the same plaintiff against one Cyrus Jay and his partner; and the undertaking of the defendant is stated to be, "That he would conduct and prosecute the said action in a proper, skilful, and diligent manner." The question, therefore, upon the first branch of the rule is, Whether, upon the *evidence, the defendant was showed to have failed in bringing sufficient skill and diligence to the conduct of such former cause.

Now, the action against Mr. Jay and his partner had been brought against them for negligence, as attorneys, in conducting the defence of the present plaintiff in a former action which had been brought against him by one Dubois; in which action against Jay and his partner it was alleged, that by reason and in consequence of the negligence of the attorneys, judgment by default had been signed, and such further proceedings had, that final judgment was afterwards signed and execution issued against Godefroy.

Upon the trial of *Godefroy v. Jay and Another*, before Mr. Justice Burrough, the only evidence which Mr. Dalton, the present defendant, had procured to

satisfy that allegation, was the book of the prothonotary of this court, in which was kept an entry of the judgments by default signed in each term, with the date and the officer's fee opposite to the same; and the learned Judge who tried that cause, held this proof of the allegation not to be sufficient, and nonsuited the plaintiff, which judgment of nonsuit was afterwards confirmed by this Court on a motion to set aside the same.

It was for the negligence on the part of Dalton, as the plaintiff's attorney, in not having provided himself with the proper evidence of that judgment as set out in the declaration, that the present action was brought; and the question is, Whether this amounts to such want of skill and diligence in his profession of an attorney, as to render him liable to the present action.

It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or **lata culpa* mentioned in some of the cases, for which he is [*468 undoubtedly responsible.

The cases, however, which have been cited and commented on at the bar, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.

Looking, then, at the particular circumstances attending the failure of the action of Godefroy v. Jay and Another, it appears, in the first place, that this was not the ordinary case of a direct allegation of a judgment on record, with a plea distinctly putting that judgment in issue; in which case of ordinary and daily occurrence, a neglect in the attorney to provide himself with regular proof of the judgment on record would have classed itself within the description of gross negligence. There is an ambiguity in the statement of the final judgment, which would lead a person not well versed in the practice of pleading to suppose that it was only alleged as a consequential damage, and not as a direct ground of action; and in the former case, the failure of producing the record would not have gone to the maintenance of the action. But looking more particularly to the evidence in the case, it appears to have been proved by a gentleman at the bar of great experience and skill, that upon the particular allegation he thought at the time the evidence offered was evidence sufficient, for that it seemed to him that negligence was the gist of **the action*, and that [*469 the judgment was only alleged as the consequence.

We lay no stress upon the fact, that the attorney had consulted his counsel as to the sufficiency of the evidence; because, we think, his liability must depend upon the nature and description of the mistake or want of skill which has been shown; and he cannot shift from himself such responsibility by consulting another where the law would presume him to have the knowledge himself. But it is from the particular nature of this misconception of the attorney, and from the evidence given in the cause, that we think the non-production of a record of judgment is not to be considered as an instance of such gross negligence as makes the defendant answerable; and we therefore think, the rule for a nonsuit ought to be made absolute.

Rule absolute.

DOE dem. CARTHEW and Others v. BRENTON. Feb. 12.

The lessor of the plaintiff having brought three ejectments in the Court of K. B. for the same property, that Court stayed the proceedings in two, and compelled the plaintiff to confine himself to one, upon certain terms which rendered it probable that in the event he would have to pay the costs; whereupon he brought an ejectment for the same property in this Court. Proceedings therein were stayed.

IN 1825 the lessors of the plaintiff brought an ejectment in the Court of King's Bench for the recovery of certain land, and part of a mine and buildings called the East Crinnis mine, in the parish of St. Blazey, in Cornwall.

The defendant appeared, and defended for the mines and buildings only, and judgment was had for the land; but, by a rule of K. B., Michaelmas term 1825, it was ordered that in executing the writ of possession for the land, the lessors of the plaintiff should be restrained from disturbing the defendant in the possession of the mines and buildings in question, and in the use of the lands, so far as the same was necessary for working the mines.

*470] After various intermediate proceedings relating to the same property, the ejectment not having been tried, the lessors of the plaintiff, in Hilary term 1829, obtained a rule nisi in K. B. to rescind the rule of Michaelmas term 1825, and to issue execution in the ordinary form.

This rule of Hilary 1829, was discharged on the following terms: that if the lessors of the plaintiff obtained the verdict, or the defendant obtained the verdict on the ground only of the leave and license of the tenant of the land, failing to prove a right of entry to erect the buildings independent of such leave, in either case it was to be referred to an arbitrator to say what compensation ought to be made to the lessors of the plaintiff, in the first case, for the entry and working of the mines without the consent of the owner and occupier of the land, and in the second, for such entry and working, as an alleged injury to the reversion, if the reversioner could by law recover such compensation.

But between Easter and Trinity terms last, the lessors of the plaintiff having brought two fresh ejectments in the King's Bench for the same property, one, on the demise of Carthew alone, another on a joint demise, a rule nisi was obtained in that Court, calling on the lessors of the plaintiff to show cause why they should not elect to proceed in one of the said three causes; and in case they should elect to proceed in either of the two last causes, then why the first cause should not be discontinued, and the costs of the defendant therein be paid by the lessors of the plaintiff; and, if they should elect to proceed in the first-mentioned cause, why the proceedings in the two last-mentioned causes should not be stayed.

On showing cause against the said last-mentioned rule on the 6th of July last it was alleged by Carthew, and sworn on his part, that the said first-mentioned action had been brought for the purpose of trying whether his present Majesty, as Duke of Cornwall, *and those claiming under him, had a right to
*471] enter upon certain lands situate and being in a certain conventional tenement within the manor of Tewington, parcel of the possessions of the said Duke of Cornwall, and work the minerals there; that the said defendant, William Brenton, who claimed such right under the said Duke of Cornwall, did not merely intend, on the trial of such ejectment, to confine himself to the trial of such right, but also meant to rely, by way of defence, on a leave and license to enter on the said lands granted by the tenants of the said Carthew, John Yeoman, Peter Yeoman, and William Yeoman, the other lessors of the plaintiff in the action; that if such defence were set up in the first-mentioned action, and were to be successful, the consequence would be, that the first-mentioned action would be defeated, and Carthew be prevented from recovering therein, although he should satisfactorily establish on the trial of the said cause that the said right of entry was not in the Duke of Cornwall, or those claiming under him; that, in order therefore, to put an end to such objection and defence, he, Carthew, and

his tenants, had, subsequently to Easter term last, revoked such leave and license, if any such existed, and had brought fresh ejectments on new demises; that he was willing to consent to a stay of the proceedings in the said last-mentioned actions, provided he were allowed to amend his declaration in the first action without payment of costs.

On the 8th July last, Lord Tenterden, C. J., delivered the judgment of the Court of King's Bench, and it was thereupon ordered,

That the lessors of the plaintiff in the first action should be at liberty to add another count to the declaration, laying the demise on a later day, and the record in such action should be amended, so as to make it consistent with the day of the demise; and, that the defendant should plead, so as to take the cause *down for trial at the next assizes; that a rule for changing the venue [*472 to the county of Somerset, and the former rule of reference, should stand; and if the lessors of the plaintiff should recover a verdict upon the new demise, they should be entitled to have a writ of possession, and recover possession of the premises; and if the defendant should obtain a verdict on the original declaration, he should have the costs of the action; and that upon the above terms, the proceedings in the two last actions should be stayed.

These terms were endorsed by the counsel on their briefs respectively.

The trial had been appointed to take place in Somersetshire, upon a suggestion that it would be difficult to obtain in Cornwall an impartial jury on the matter in dispute. The witnesses were accordingly in attendance at the last Somersetshire assizes, but the trial of the cause was put off in consequence of the illness of the Judge. The costs incurred, however, by all these proceedings were enormous; and now,

The lessors of the plaintiff commenced another ejectment in this Court for the recovery of the same property; whereupon,

Wilde, Serjt., upon affidavit of the foregoing facts, obtained a rule nisi to stay the proceedings; against which

Ludlow and *Merevether*, Serjts., showed cause.

This is a motion of the first impression, at least in this Court; and the utmost that can be required is, that the lessors of the plaintiff shall be put to their election as to which cause they will proceed with. It would be a great hardship to refuse them the opportunity of trying their rightful claim till they have discharged heavy costs which have been occasioned by the defendant's raising an issue foreign to the merits of the title. As it *is now proposed to try [*473 the merits of that title, the present ejectment is a proceeding in a matter altogether different from the former, which would decide only a question of license. In *Chatfield v. Souter*, 3 Bingh. 167, this Court refused to stay the proceedings in a writ of right on the ground that the costs of an ejectment for the same property had not been paid, because the ejectment could not decide the merits of the demandant's title; and though in *Doe d. Walker v. Stevenson*, 3 B. & P. 22, this Court stayed the proceedings of the lessor of the plaintiff till he had paid the costs of an ejectment in which there had been a verdict against him as defendant, yet in a note to that case the learned reporter says, "The practice of the two Courts, as to staying proceedings in other actions by the same plaintiff for the same cause, seems to differ thus far, that the Court of K. B. stays proceedings till the costs of the former action are paid, wherever the plaintiff's proceedings appear to be vexatious; but the Court of C. B. never interferes unless the merits of the case have been tried in the former action. See *Weston v. Withers*, 2 T. R. 511, *Moulton q. t. v. Bingham*, and *Baldwin v. Richards*, 2 T. R. 511, n., for the practice of K. B.; and *Cox v. Chubb*, 2 Bl. 809, and *Cooke v. Dobree*, 1 H. Bl. 10, for the practice of C. B.; also *Hullock's Law of Costs*, p. 463 to 467."

The merits not having been disposed of in the present case, the Court will decline to interfere.

Wilde was stopped by the Court.

TINDAL, C. J. By this ejectment, the lessors of the plaintiff seek to recover

property for which they have already brought three ejectments in another court: and if the proposition went no further, there would be sufficient ground for not *474] permitting them to proceed while they have another suit for the same cause in another court, and that suit has been specially appointed for trial in an adjoining county. But it does not rest on that; for a rule relating to those ejectments has been obtained in the Court of King's Bench, and assented to by the counsel for the lessors of the plaintiff, which gives certain rights on both sides; and we are called on to deprive the defendant of the rights acquired under that rule by permitting the lessors of the plaintiff to elude it by the mere formality of commencing a fresh action in this court. As to election, the parties made their election upon the drawing up of that rule; and though it is said that this action is not brought for the same cause as the first ejectment, because license only was put in issue there, yet it is not pretended that the action is not brought for the same cause as the second ejectment in which the Court of King's Bench has stayed the proceedings. As the parties have decided for themselves by electing to go to trial in the first ejectment upon the terms proposed by that Court, we should not do justice if we did not stay the proceedings here.

PARK, J. I heartily concur in what has been said by my Lord, and never saw so clear a case.

GASELKE, J., declined to take any part, having been concerned in the cause while at the bar.

BOSANQUET, J. The object of this ejectment is to defeat the rule which has been consented to in the Court of King's Bench. The proceedings in ejectment being fictitious, are peculiarly under the control of the Court, and the object of this action being to defeat an arrangement which the lessors of the plaintiff have assented to in another court, we are justified in interfering.

Rule absolute without costs.

*475]

•IN THE HOUSE OF LORDS.

DENN dem. NOWELL v. ROAKE. Feb. 16.

Where A. B., seised in fee of one moiety of certain premises in the county of S., and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows:—"I give and devise all my freehold estates in L. and county of S., or elsewhere, to my nephew J. R. for life, on condition that, out of the rents thereof, he do from time to time keep such estates in repair;"—Held, that this did not operate as an execution of the power, but passed that moiety only of which testator was seised in fee.

THIS cause having been removed by a writ of error from the Court of Common Pleas to the Court of King's Bench, and thence to the House of Lords, the opinion of all the Judges (a) was now delivered by

ALEXANDER, C. B. My Lords,—There is no difference of opinion among the Judges in this cause.

The question which they have had to consider in pursuance of your Lordships' order, is expressed in these words:—

Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of appointment of that moiety of the tenements in Surrey, of which she was tenant for life, with the power of appointment stated in the special verdict.

The facts stated in the special verdict, which it is material to recollect, are these:—In the year 1749, estates, one moiety of which is now in question, upon the death of their father, Miles Poole, descended upon Sarah the wife of Thomas Scott, and Elizabeth the wife of Henry Roake, who were his daughters and co-heirs, validly settled to the following uses; one full undivided moiety to the use of Thomas Scott for life; the remainder to the use of Sarah Scott his

(a) For the case at length, and arguments, see 5 B. & C. 720, 2 Bingh. 497.

wife for life; remainder to the use of such person or persons, and for such estate *and estates, as the said Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed [*476 in the presence of three or more credible witnesses, with or without power of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time limit, direct, or appoint; and for want of appointment, to the use of the children of that marriage; and in default of issue, this moiety was limited to Elizabeth Roake for her life, with limitations to her family analogous to those which I have mentioned respecting Sarah Scott and her family.

The other undivided moiety was limited for the use of Eliz. Roake for life, subject to limitations exactly of the same nature and description with those I have already mentioned as to the preceding moiety. It is unnecessary to detail them. Sarah Scott survived her first husband, Thomas Scott, and afterwards intermarried with one John Trymmer, whom she also survived.

She became a widow the second time in 1766. In 1775 she purchased the other undivided moiety from the family of Roake. By deeds dated in that year, that moiety was conveyed to make a tenant to precipe, in order to the suffering of a common recovery, which recovery it was declared should enure to the use of Henry Roake for life, with remainder to Sarah Trymmer, the widow, in fee. Henry Roake died in 1777, and by his death Sarah Trymmer came into the possession of that undivided moiety. From this time, therefore, to the time of her death, she had the absolute and entire interest in that undivided moiety of the estate which had been originally by the deeds of 1750 limited to the family of Roake; and as to her own moiety, her first *husband, Thomas Scott, being dead, she was tenant for life of it, with power of appoint- [*477 ment or authority before particularly stated, and in default of appointment the estates stood limited to the several uses I have also before stated.

Such were the rights, interests, and authorities which were vested in Sarah Trymmer when she made the will to which the question put by your Lordships refers.

That will is dated on the 6th of June, 1783, has all the solemnities required by the deed of 1750, creating the power, and is, so far as respects this subject, in the following words:—"I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake, for his life, on condition that out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew John Roake, I devise all my estates, subject to and chargeable with the payment of 30*l.* a year to Ann, the wife of the said John Roake, for her life, by even quarterly payments to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one. And in case my said nephew John Roake should die without issue, or such lawful issue should die before twenty-one, then I devise all the said estates, chargeable with such annuity of 30*l.* a year to the said Ann Roake for her life in manner aforesaid, to and among my nephews and nieces Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns for ever."

My Lords, we are of opinion that this devise is not an execution of the authority given to Sarah Trymmer *by the settlement of 1750. There are many cases upon this subject, and there is hardly any subject upon which the [*478 principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with Sir Edward Clere's case, in the reign of Queen Elizabeth, to be found in the sixth report, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or

authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority.

In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. All the words are satisfied by the undivided moiety of which she was the owner in fee.

It is said that the present is a question of intention, and so perhaps it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled.

It would be extremely dangerous to depart from these rules, in favour of loose speculation respecting intention in the particular case.

It is, therefore, that the wisest Judges have thought proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them.

I will refer to one only, to *Jones v. Tucker*, 2 Mer. 533, before *Sir William Grant. In that case a person had power to appoint 100*l.* by her will; she bequeathed 100*l.* to the plaintiff, and, it is said, had nothing but a few articles of furniture of her own to answer the bequest.

The language, which, according to the reporter, Sir W. Grant used was this, "In my own private opinion, I think the intention was to give the 100*l.* which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

The only circumstance that has been pointed out as furnishing evidence of the testatrix's intending to execute the power in question, is the condition annexed to the devise to John Roake the devisee for life, viz. *that he should, out of the rents and profits of the devised premises, keep them in tenantable repair.*

I say this is the only circumstance, because it has been fixed by many cases, that using the words "my estates," although the subject of the power might have been at one period the property of the person to exercise it, will not be considered as an execution of the power.

We are of opinion that the direction respecting the repairs has no effect in proving, according to the authorities, that this testatrix meant to execute her authority over the undivided moiety of this estate.

It appears to us that this would be to contradict that long list of decisions to which I have referred, and would be to indulge an uncertain speculation in opposition to positive rules.

There is no incongruity in directing a tenant for life of an undivided moiety to keep his share of the premises in repair. A person with such an interest is not without remedies for enforcing repairs, and at the worst the devise would make him liable as against the remainder-man for dilapidation.

*480] *It seems, therefore, to my Brothers as well as to myself, that the question which your Lordships have been pleased to put to us should be answered in the negative, and that the will of Sarah Trymmer did not operate as an execution of her power.

Judgment of the Court of King's Bench affirmed.

MEMORANDA.

Mr. Justice Burrough having resigned, Mr. Serjeant Bosanquet was appointed a Judge of this Court, and took his seat on the 3d of February.

The first of the three general rules, *ante*, p. 347, was sent to the reporter by mistake, and never received the ultimate sanction of the Court.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN

Easter Term,

IN THE ELEVENTH YEAR OF THE REIGN OF GEORGE IV.

WOOD v. ADAM. *April 29.*

Defendant told J. P. that certain oranges of J. P.'s would not have sold so ill if plaintiff had not, before the sale, propagated a report that *there were* three or four cargoes of oranges then coming to market; whereupon J. P. discontinued employing the plaintiff as he had before been wont:

Plaintiff thereupon sued defendant for injuring him, by stating that plaintiff had caused the loss on J. P.'s oranges, by propagating a report that *he (plaintiff) had* three or four cargoes of oranges coming to market:

Held, a fatal variance.

THE declaration stated, that the plaintiff, before the time of the committing the grievances by the defendant thereafter mentioned, had been and was a fruit-broker and the business of a fruit-broker exercised and carried on with great credit and integrity, to wit, at London; that certain oranges of and belonging to certain persons under the style or firm of Messrs. John Pirie & Company, had recently, before the committing of the said grievances by the defendant as next *mentioned, been sold and disposed of for the account of the said [482 Messrs. J. Pirie & Co., at and for certain prices unsatisfactory to the said Messrs. J. Pirie & Co., to wit, at, &c., to wit, in a certain sale-room or premises there; and thereupon afterwards, to wit, on, &c., at, &c., in a certain discourse which the defendant then and there held with John Pirie (then and there being one of the persons so trading under the said style or firm), of and concerning the said sales of said oranges, and of and concerning the cause of the same not having fetched better prices, the defendant then and there maliciously contriving and intending to prejudice and injure the plaintiff in the way of his business, and to deprive him of the confidence and good opinion of the said Messrs. J. Pirie & Co., and to cause the last-mentioned persons to believe that the said plaintiff had been the cause of the same not having fetched better prices on the occasion aforesaid, did then and there falsely, deceitfully, and maliciously pretend and represent to the said John Pirie, that the plaintiff had circulated a report in the sale-room, when and where the said oranges were selling, that *he, the plaintiff, then had* three or four vessels laden with oranges between Gravesend and London, and that the said report had injured

the said sale of the said oranges of them the said Messrs. J. Pirie & Co. : whereas the plaintiff, in truth and in fact, did not circulate or cause to be circulated, a report in the sale-room when and where the said oranges were selling as aforesaid, or otherwise howsoever, that he, the plaintiff, then had three or four vessels laden with oranges, or any vessel or vessels laden with oranges between Gravesend and London, and, whereas in truth and in fact, it was not reported at or during the said sale, that the plaintiff had three or four vessels laden with oranges, between Gravesend and London, or that he *483] had any vessel or *vessels so laden as aforesaid between Gravesend and London, as the defendant during all that time well knew. By means of which said several deceitful and malicious representations and pretences of the defendant, the said Messrs. James Pirie & Company, then and there believing the same to be true, were then and there induced to suspect and believe, and did in fact suspect and believe that the plaintiff had maliciously made or authorized the said report as to his, the plaintiff's, having three or four vessels laden with oranges between Gravesend and London, and had thereby maliciously prejudiced the said sale of them, the said Messrs. J. Pirie & Co.'s said oranges, and been the cause of their not having fetched better prices on the occasion aforesaid, and thereby the said Messrs. J. Pirie & Co. were then and there induced to discontinue, and did, in fact, accordingly then and there discontinue, and hitherto had discontinued dealing with the plaintiff as they theretofore had been used to deal, and but for the premises in that count mentioned, still would have dealt with him in the way of his business of a fruit-broker; and the plaintiff had thereby lost divers profits and emoluments, to wit, to the amount of 100*l.*, which he otherwise would have acquired from being so dealt with as theretofore by said Messrs. J. Pirie & Co.; and the plaintiff had been, and was by means of the premises in that count mentioned, brought into great scandal and discredit in the way of his said business and had been and was thereby otherwise greatly injured and damnified, to wit, at, &c.

At the trial before Tindal, C. J., London sittings after Hilary term, the language of the defendant in repeating the assertion which he alleged the plaintiff to have made, in order to injure the sale of Pirie's fruit, was proved to have been:—"The prices could not have been so unsatisfactory, if the plaintiff *484] had not before *the sale propagated a report that *there were* three or four cargoes of oranges coming up from Gravesend."

Whereupon the plaintiff was nonsuited, the Chief Justice thinking the variance material.

Wilde, Serjt., now moved to set aside the nonsuit, on the ground that as this was not an action of slander, but to recover damages for the consequences of a misrepresentation, it was sufficient if the misrepresentation were proved to be one which would have had the same effect as that set out in the declaration, and that the precise language in which it was conveyed was not material. The gist of the action was the injury done to the plaintiff, by the defendant's having imputed to him, that with a view to injure the sale of Pirie & Co.'s fruit, he had alleged that more fruit ships were coming to market. Such a statement would doubtless have been calculated to prevent a purchase of fruit, but the naming the owner of the ships would not have made any difference in the effect produced, and therefore it was immaterial whether the name of the owner formed part of the statement or not. In like manner, in an action for a tort committed during the performance of a contract, the precise terms of the contract are not material, and a variance in that respect is not fatal. *Ditcham v. Chivis*, 4 Bingh. 706; and the cases there cited.

TINDAL, C. J. It appeared to me that this action was in substance an action for words spoken of the plaintiff in his trade, in consequence of which Pirie & Co. had declined to employ him, as they otherwise would have done, and that it ought to be governed by the rules which apply to actions of that kind. One *485] of those rules is, that the plaintiff is not to charge the defendant *with having employed language of greater malignity than that which he

actually used, because the damages must often depend on the form of the expression.

The words complained of by the plaintiff in this case, as imputed to him by the defendant, were,—“That *he* had three or four cargoes of oranges on the way from Gravesend.” Now, if he had made such a statement, it must have been false within his own knowledge, and much more culpable than a general statement, the accuracy of which he might not have had the means of ascertaining. But the witnesses prove only that the defendant alleged the plaintiff to have given out that *there were* three or four ships coming up with fruit, not that the plaintiff himself had that number of ships coming up.

PARK, J. I do not impeach the rule acted on in *Ditcham v. Chivis*, and though this is in effect an action of slander, there would perhaps have been no ground for complaint if the words proved had been the same in substance and effect as those laid in the declaration. But the importance of the statement alleged to have been made by the plaintiff hinged on the assertion that he himself had vessels coming up with fruit.

GASELEE, J. I think the nonsuit is right; for it is very different whether the plaintiff were represented as having spoken of his own knowledge, or merely on general report.

BOSANQUET, J. The statement proved varies in a material point from that set out in the declaration, which contains a charge of a very different description. I think, therefore, the nonsuit was right. Rule refused.

*DANCE, provisional Assignee of SHEPHERD, an Insolvent, [*486
v. WYATT. April 29.

The sixteenth section of the 7 G. 4, c. 57, which declares that it shall be lawful for the provisional assignee of the insolvent debtors' court to sue in his own name for the effects of insolvents, if the court shall so order, is only affirmative of the provisional assignee's right, and he may sue with or without such order.

By the insolvent debtors' act, 7 G. 4, c. 57, s. 16, it is declared, that it shall be lawful for the provisional assignee to *sue* in his own name, if the court appointed by the act shall so order, for the recovery, obtaining, and enforcing of any estate, debts, effects, or rights of any prisoner, &c.

The plaintiff being provisional assignee of the Insolvent Debtors' Court, this action of trover was brought in his name, under the following order of the Court, to try the validity of a commission of bankrupt which had been issued against Shepherd previously to his petitioning the Insolvent Debtors' Court.

“Pursuant to the act for Relief of Insolvent Debtors in England :—

“The Court for Relief of Insolvent Debtors, on the 9th day of December, 1828 :—

“In the matter of the petition of Thomas Shepherd, an insolvent debtor, lately a prisoner in the King's Bench prison :—

“Upon application of the said insolvent debtor, and on reading his affidavit, and also on reading the consent of Henry Dance, gentleman, provisional assignee, it is ordered, that the said provisional assignee, upon receiving a satisfactory indemnity, be at liberty to *permit an action to be brought* in his name against Andrew John Nash and Thomas Wyatt, mentioned in the said affidavit.”

The declaration commenced as follows :—“Thomas Wyatt the defendant, and Andrew John Nash were *attached to answer Henry Dance, the plaintiff in this suit, and provisional assignee of the court for the relief of insolvent debtors, and of the estate and effects of Thomas Shepherd, late of Claremont Row, Pentonville, in the county of Middlesex, heretofore an insolvent debtor, and discharged from imprisonment in pursuance of an act of parliament made in the seventh year of the reign of his present majesty, entitled, ‘An act to

amend and consolidate the laws for the relief of insolvent debtors in England,' by order of the same Court in that behalf duly made, of a plea of trespass on the case."

The insolvent, in his petition, had described himself as of Claremont Row, Pentonville, merchant and bankrupt.

A verdict having been found for the plaintiff,

Taddy, Serjt., moved to set it aside and enter a nonsuit, on the ground that, under the sixteenth section of the act, the plaintiff, as provisional assignee, was not entitled to sue unless it appeared by the order of the Insolvent Debtors' Court, that the Court had granted such order in the exercise of its discretion, upon investigating the circumstances of the case: that the present order directed the provisional assignee to permit an action to be brought, while the act directed that the assignee himself should sue: and that it was not competent to the Insolvent Debtors' Court to direct an action to be brought for the purpose of impeaching the jurisdiction of the commissioners of bankrupt, the bankruptcy jurisdiction appearing to be preferred by the legislature whenever the two jurisdictions may be found to clash; as by the 6th section of the 6 G. 4, c. 16, where the filing a declaration of insolvency is allowed to be treated as an act of bankruptcy. The objection particularly applied in the present case, where the insolvent had in his petition described himself as a bankrupt.

*488] He also moved on the ground that the verdict was contrary to evidence as to the trading of the insolvent.

The Court adjourned the case to look into the decisions, and now

TINDAL, C. J., said,—Upon looking into the cases, we think this rule ought not to be granted.

Three objections have been taken to the verdict. First, that the plaintiff had no authority to sue without a direct order from the Insolvent Debtors' Court, obtained upon a consideration of the circumstances of the case. But, upon looking at the statute, we think the assignment itself would *primâ facie* give the plaintiff a right to sue; and the language of the 16th section seems to be only affirmative, and not to interfere with the assignee's *primâ facie* right. And this point has in effect been decided in *Doe d. Clark v. Spencer*, 3 Bingh. 203, where this Court held, that the order of the Insolvent Debtors' Court need not be given in evidence at the trial. And although that was a decision on a former statute, yet the language in both statutes is the same.

The second objection is, that the Insolvent Debtors' Court is not competent to institute proceedings for the purpose of impeaching the jurisdiction of the commissioners of bankrupt.

But this objection assumes that the insolvent has been a bankrupt, which is the very point in dispute.

The evidence as to the trading was fully left to the jury, and we have no reason to be dissatisfied with the conclusion to which they have come.

Rule refused.

*489]

*LLOYD v. WIGNEY and Others. May 3.

By the Brighton improvement act, actions for any injury done by the commissioners under the act, are to be brought within six months after *the thing done*.

The defendants proceeding under that act to dig a sewer, cracked the walls of the plaintiff's house: Held, that the plaintiff's right of action was limited to six months after the day on which the crack was occasioned, and did not continue for as long a time as the crack continued.

THE fourth count of the declaration stated, That before and at the time of the committing the grievances thereafter next mentioned, the plaintiff was lawfully possessed of a certain messuage, dwelling-house, and stabling, with the appurtenances thereto belonging, called the New Ship Inn, situate and being in Ship Street in the parish of Brighthelmstone, in the county of Sussex; which

said messuage, dwelling-house, and appurtenances, he the said plaintiff used and occupied as an inn for the reception, lodging, and entertainment of travellers and others putting up and abiding therein, and the business of an innkeeper used, exercise, and carried on therein, to wit, at, &c. Yet the said defendants, well knowing the premises, but contriving and intending to injure and aggrieve the said plaintiff in the use, occupation, and enjoyment of the said messuage, dwelling-house, and stabling, with the appurtenances, theretofore, to wit, on the 19th of February, 1828, and on divers other days and times between that day and the day of the commencement of that suit, at, &c., wrongfully and unjustly, without leave or license of, and against the will of the said plaintiff, did, by divers wrongful and improper acts, and otherwise, wrongfully and injuriously cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling, and the said messuage and dwelling-house, and premises, then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid, *hitherto; and by means of the premises the said plaintiff had been forced and obliged to pay, lay [*490 out, and expend, and had paid, laid out, and expended, divers large sums of money, amounting in the whole to the sum of 500*l.* of like lawful money, in repairing, supporting, and amending the foundation, walls, and other parts of the said messuage, dwelling-house, and premises; and also during all the time aforesaid, the said plaintiff, his family and guests residing in the said messuage, were greatly disturbed and incommoded; and also by means of the premises, divers persons, who, at the time of the committing the grievance last aforesaid, were boarding, lodging, and residing in the said messuage and dwelling-house and premises, of the said plaintiff, to the great gains and profits of the said plaintiff, left and quitted the same; and also by means of the premises, the said plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of 100 travellers and guests who would otherwise have employed said plaintiff in his said trade and business, and put up, resided, and lodged, at the said premises of the said plaintiff, to the great gains, profits, and advantage of the said plaintiff, to wit, at, &c.

At the trial before Gascolee, J., Sussex Summer assizes 1829, it appeared that the defendant Wigney, as treasurer, and the other defendants as surveyor and contractors, under an act for the improvement of the town of Brighton, had, for the purpose of making a sewer, dug a trench twenty-seven feet deep in the street where the plaintiff's house stood. The soil being of a friable nature, and the defendants not having supported the sides of the trench with struts across, the foundation of the house sank, and the walls cracked, although they had been shored up by the defendants. All this had taken place previously to the 6th of April, 1828. The plaintiff *commenced his action on the 6th of [*491 October in that year, after giving the defendants the following notice:—
 “To William Wigney, Amon Wilds, William Lambert, senior, and William Lambert, junior.—I do hereby give you notice that, at or shortly after the expiration of fourteen days from the time of your being served with this notice, I shall commence an action in the Court of Common Pleas against you, to recover damages for the injury I have sustained by reason of your wrongful acts, to wit, that you did sometime in the months of February, March, and April, now last past, by yourselves, your servants or workmen, make, alter, cut, dig, work, and enlarge, divers sewers, gutters, drains, and ditches, in and under a certain street in the town of Brighthelmstone, in the county of Sussex, commonly known by the name of Ship Street, near to and under a certain messuage or dwelling-house, stabling and premises, in my tenure and occupation as an inn, commonly known by the name of the New Ship Inn, situate and being in Ship Street aforesaid, in so negligent, incautious, improvident, and improper a manner, that certain of the walls of the said messuage and premises sank and cracked, and the said messuage and premises generally became and were greatly endangered, and otherwise injured, and by reason thereof, certain persons then

using the said messuage and premises as such inn as aforesaid immediately quitted the same, and divers other persons have since omitted to use the said messuage and premises as such inn as aforesaid, who would have frequented and used the same but for the damage occasioned in manner above mentioned; and also that you did, by yourselves, your servants or workmen, after the sinking and cracking of the walls as aforesaid, so insufficiently, imprudently, and unskillfully shore up and support the said messuage and premises, that I have been for many months deprived of so full and beneficial an enjoyment and *492] occupation thereof as I ought to and *otherwise should have had, and by reason of the above premises I have suffered great loss and damage.

"Dated this 19th of September, 1828.

(Signed)

"DAVID LLOYD."

The defendants had, in the outset, given the plaintiff notice of their intention to construct a sewer.

The plaintiff proved, that subsequently to the 6th of April, he was inconvenienced by the shores preventing free access to his house. The crack in his wall was not repaired until after that day.

The 255th section of the Brighton act, 6 G. 4, c. 179, having enacted that actions against persons proceeding under the act shall be brought within six calendar months after *the matter or thing done*, and that notice shall be given to the commissioners appointed under the act of the ground of action, it was objected on the part of the defendants, that the action had been commenced too late; that there had been no proof of any of the injuries specified in the notice to the treasurer having been experienced within six months; that there was no count in the declaration applicable to the injury alleged to have been occasioned by the prevention of access; that the notice ought to have been addressed to the commissioners, or to the treasurer in his character of treasurer; and that the action did not lie for the plaintiff, who ought, upon receiving notice of the commissioners' intentions, to have taken precautions for the safety of his own house.

The learned Judge left it to the jury to say, whether there had been negligence in the commissioners; whether they had given notice of their intentions as to the sewer; and whether the access to the plaintiff's house had been obstructed subsequently to the 6th of April.

The jury found for the plaintiff 100*l.* damages, and that the access had been obstructed subsequently to the 6th of April.

*493] *Wilde, Serjt., pursuant to leave reserved, obtained, upon the objections advanced at the trial, a rule *nisi* to set aside the verdict, and enter a nonsuit.

Taddy, Serjt., showed cause on all the points; but the judgment of the Court is confined to the question of time.

The action was brought in time; for the *thing done*, in the language of the statute, is the injury to the plaintiff as long as it continues; and the plaintiff has six months from the time the injury has ceased. The plaintiff's wall was cracked, and his foundation disturbed, and as long as the cracks continued, he was entitled to bring his action. But at all events the obstruction to access was within the six months, and that is an injury comprehended in the language of the fourth count of the declaration, and in the notice given to the treasurer. The fourth count of the declaration, on which the plaintiff relies, alleges that the defendants "did by divers wrongful and improper acts, and otherwise, wrongfully and injuriously cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and the said messuage and dwelling-house, and premises, then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid hitherto; that during all the times aforesaid, the said plaintiff, his family, and guests residing in the said messuage, were greatly disturbed and incommoded; and that by means of the premises the said plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and em-

ployment of divers, to wit, of 100 travellers and guests, who would otherwise have employed said plaintiff in his said trade and business, and put up, resided, and lodged at the said premises of the said plaintiff."

*The defendants, by placing the shores against the plaintiff's house, admit that they have occasioned the subsidence of the walls, and that [*494 they are responsible for the consequences; and all the ensuing mischief is comprehended in the injury to the wall, which is the original cause of the obstruction. It is not necessary that the notice should be drawn up with minute precision. In *Jones v. Bird*, 5 B. & A. 843, the notice ascribed the injury to the digging of a drain, whereas the immediate cause of injury was the falling of chimneys occasioned by the digging of the drain.

Wilde (*Andrews*, Serjt., was with him) in support of the rule. Continuing damage can only be, where each day brings a repetition or accession of injury, as where water is forced back or diverted, or an imprisonment prolonged: In which case a defendant may be liable for the portion of imprisonment endured within the time limited for action: *Massey v. Johnston*, 12 East, 67. But if a wall be cracked, and remain in the same state for months, the damage is always the same, and the time for suing must be calculated from the day when the crack was occasioned, otherwise a party, by suffering things to remain in the same state, might postpone his action till all the defendant's evidence had perished.

In *Goding v. Ferrers*, 2 H. B. 14, it was held, that an action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure; notwithstanding a suit be instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. In *Saunders v. Saunders*, 2 East, 254, where the commander of *one of the [*495 king's armed vessels seized a vessel and cargo at sea, and put them into the next port on suspicion of smuggling, and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only a part of the goods from the defendants, it was held, that the owner could not maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. So, in *Crook v. M'Tavish*, 1 Bingh. 167, where an officer in the preventive service boarded a ship on the 23d of August, and left three armed men on board, but did not then determine on detaining her as a seizure; on the 25th he decided on seizing her, and detained her till the 24th of September; the owner having sued him for this seizure and detention, it was held, that the time within which the action should have been commenced under 28 G. 3, c. 37 (three months after the matter or thing done), must be computed from the 23d of August. In *Gilton v. Bodington*, 1 R. & M. 161, and *Roberts v. Read*, 16 East, 215, though the act done by the defendants which occasioned the injury to the plaintiffs was beyond the time limited for action, the injury itself, namely, the falling of the walls, took place within the limited time; but in the present case, the injury to the plaintiff, viz. the cracking of his wall, was, as well as the act of the defendants, beyond the limited time.

The plaintiff, therefore, is too late; for the obstruction of access, occasioned by the continuance of the shores, is not one of the injuries complained of in the declaration or notice. Injury to a wall is an injury of so different a nature from injury occasioned by obstruction of access, that it could never have occurred to the defendants that the one was intended to comprehend the other.

*TINDAL, C. J. It is unnecessary for us to decide many of the points which have been argued in this cause; for the first question is, Whether [*496 any damage has been proved to have been sustained by the plaintiff within the time limited for the commencement of his action by the 255th section of the statute, and within the terms of his notice and declaration: for unless he brings himself within all those three predicaments his action does not lie. Now, the jury have negatived any damage within the six months allowed for the commencement of the action, except the keeping up the shores and the consequent

obstruction of access to the plaintiff's house. Is this a damage specified in the plaintiff's notice or his declaration? The notice is, that the defendants made a sewer near the plaintiff's premises in so negligent a manner that the walls of the premises sank and cracked, the premises were injured, many persons quitting them, and many persons abstaining to use them who would otherwise have used them, and also that the defendants so unskillfully and imprudently shored up the walls of the premises as to deprive the plaintiff of the full and beneficial enjoyment he would otherwise have had. The count of the declaration which is relied on, states, that the defendants "did, by divers wrongful and improper acts, and otherwise wrongfully and injuriously, cause and procure the foundation and walls, and other parts of the said messuage, dwelling-house, and premises, to sink, bilge, and become cracked, injured, and broken, and in danger of falling; and the said messuage and dwelling-house and premises, then and there became and were rendered unfit for habitation for a long space of time, to wit, from the day and year aforesaid hitherto; that during all the times aforesaid, the said plaintiff, his family, and guests residing in the said messuage, were greatly disturbed and incommoded; and that, by means of the premises, *497] the said plaintiff had been greatly injured in his business of an innkeeper, having lost the custom and employment of divers, to wit, of 100 travellers and guests, who would otherwise have employed said plaintiff in his said trade and business, and put up, resided, and lodged at the said premises of the said plaintiff."

This does not correspond with the only damage proved within six months, namely, the keeping up the shores; and there being no mention of that in the notice or declaration, the rule must be made absolute.

PARK, J. I am of the same opinion. The digging of the sewer took place more than six months before the action commenced, and so did the damage occasioned by it. Then, has the shoring up of the house occasioned injury to the plaintiff? It may have done so, but it is not stated either in the notice or declaration; and, therefore, the action, as conceived, is too late.

GASELEE, J. This verdict could only now be supported on the supposition that the injury proved within the six months, was part of the injury occasioned by the construction of the sewer, and described in the declaration and notice; and the question is, whether the shoring up the walls, and consequent obstruction of access, might not be considered as a continuing damage within the terms of the declaration? I have some little doubt on the subject, but not enough to induce me to divide the Court; and I agree that the complaint as to the omission to remove the shores, is not comprehended in the notice or declaration.

BOSANQUET, J. I am of opinion that this rule ought to be made absolute. Two injuries have been complained of: the construction of a sewer, by which *498] the plaintiff's walls were cracked; and the omission to remove certain shores from his house, by which access to it was obstructed. The first occurred more than six months before the action was commenced; for I cannot consider the continuance of the cracks in the wall as a continuing damage, since the damage was the same at the end of six months as at first. There was no repetition of injury in the interval. As to the second, it was not within the terms of the plaintiff's notice or declaration. Rule absolute.

CHAMBERS v. BERNASCONI and Another. May 3.

Where an uncertificated bankrupt, in order to try the validity of his commission, held his assignee to bail in an action for money had and received, the Court discharged the assignee upon signing common bail.

THE plaintiff, an uncertificated bankrupt, with a view to try the validity of the commission, arrested the defendants, his assignees under the commission,

for 40,000*l.* as money had and received to his use: whereupon Tindal, C. J., during vacation, issued an order for liberating the defendants on filing common bail.

Russell, Serjt., on the part of the plaintiff, now moved to rescind this order, or for the defendants to pay 40,000*l.* into court. He submitted, that although it was usual to try the validity of a commission of bankrupt by an action of trover, yet it might equally be disputed in an action for money had and received; *Donovan v. Duff*, 9 East, 21, —in which case, though the decision was against the bankrupt on another ground, no exception was taken to the form of action; —and if so, the giving of special or common bail depended on the amount for which the defendant was arrested, and not on the *discretion of the Court. *Tidd*, 249. No distinction could be drawn between this and any [*499 other action the merits of which the Court would not try on affidavit. In *Ex parte Cutten*, 1 Glyn & J. 317, a bankrupt who had abandoned a petition presented by him in June 1821 for a supersedeas, and had joined in a conveyance of part of his property, and solicited and procured the requisite signatures to his certificate, was restrained from proceeding in an action brought by him against the messenger to impeach the commission; but the plaintiff here had never abandoned his right to dispute the commission, or obtained his certificate.

The Court took time to consider, and its decision was now pronounced by TINDAL, C. J. This was an application to the Court for a rule to show cause, why an order made by the Chief Justice, in vacation, in this cause, should not be set aside; or why the sum of 40,000*l.*, for which the defendants had been arrested, should not be paid into Court.

It appeared, upon the making of the original order, that the plaintiff was an uncertificated bankrupt, and that he had issued bailable process against the defendants, who were his assignees, upon an affidavit that the defendants were indebted to him in 40,000*l.* and upwards, for money had and received to his use; it being the professed object of the plaintiff to try, by this mode of proceeding, the validity of the commission issued against him. Upon this process two of the defendants had been arrested, and had given bail to the sheriff; and upon application by them to the Chief Justice, that the bail bonds should be delivered up to be cancelled on the defendants' entering a common appearance, an order to that effect was made.

*It has been objected, that there is no ground for such an order; for [*500 that the bankrupt has a right to try the validity of the commission by this form of action; and, if so, has the right, like any other subject, to the security of his debtor's person; and that it is contrary to the practice of the Court to try the merits of the action on affidavits.

But we think the courts have always exercised, and have the power to exercise a general control over the right of the plaintiff to hold to bail. Before the statute of 12 G. 1, c. 29, the power of arresting depended on the practice of the Court only, modified from time to time by rules of the Court for that purpose. Thus, the practice of not allowing a second arrest for the same cause of action; of not allowing an arrest when the original debt was less than 10*l.*, but raised up to that sum by the costs of a former action; of allowing the plaintiff to hold to bail in actions of trover and trespass, have no other foundation than the rules of the Court. And the statute above referred to took away no authority which the Court antecedently possessed, except that it prevented the issuing of bailable process for a smaller sum than 10*l.* The Courts, therefore, may still interpose, and accordingly, in various cases, have interposed in a summary way, and have discharged the defendant on common bail. Thus, in *Fry v. Malcolm*, 4 Taunt. 705, where the plaintiff had commenced an action on the prothonotary's *allocatur* for costs, and had arrested the defendant, this Court, though they would not stay the proceedings, held the arrest to be bad. In *Taylor v. Higgins*, 8 East, 169, the Court of King's Bench discharged a defendant out of custody, on the ground, that the giving a new security by the plaintiff to a creditor of the defendant, could not be considered as money paid *to [*501

the defendant's use, upon which ground alone he had been held to bail. In *Nizetich v. Bonacich*, 5 B. & A. 904, the Court of King's Bench discharged the defendant, where it appeared from the plaintiff's own letters that the defendant was his creditor in a considerable sum; and in *M'Ginnis v. M'Curling*, 6 Dowl. & Ryl. 24, the principle that such excepted cases may exist, in which the Court may interpose by their summary jurisdiction and discharge the defendant, was fully admitted by the Court.

And we think the principal case is of that description. An uncertificated bankrupt can have no property, no rights of action even against third persons, unless with the assent of his assignees. How can he have any as against the assignees themselves? It should be remembered also, that before he was declared a bankrupt, the facts necessary to establish the bankruptcy must have been deposed on oath by third persons, and the bankruptcy declared by the adjudication of commissioners sitting under the authority of an act of parliament; and it seems unreasonable, that upon the single and unconfirmed affidavit of the bankrupt himself, all that has been so done should be taken to be without foundation; and looking at the consequences of allowing such a proceeding, we think they would be most injurious to the public; for what respectable person would become assignee to a bankrupt's estate, if, at any moment of time, he was liable to be arrested for the full amount of the assets realized, merely because the bankrupt believed, to which belief his wishes would often lead him, that the commission was invalid? Without breaking in, therefore, upon the general rule, that the Court will not try the merits of a case on counter affidavits, *502] we think this case forms an exception of so strong a nature *that all must reclaim against applying to it the general rule; and, upon this ground, we refuse the rule to show cause. Rule refused.

CUMING and Another, Assignees of HEALE, a Bankrupt,
v. WELSFORD and Others. May 4.

An execution on a final judgment following a judgment by *nil dicit*. held to be within the proviso of s. 108, 6 G. 4, c. 16, although there was no concert between the parties, and the judgment was obtained before the act came into operation.

By 6 G. 4, c. 16, s. 108, it is enacted, "That no creditor, having security for his debt, or having made any attachment in London or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied, by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

Heale, the bankrupt, having been sued by the defendants in *assumpsit* for the recovery of the amount of a bill of exchange drawn by him, suffered judgment by *nil dicit* in January 1825. A writ of error having been brought, judgment was affirmed in Hilary term 1826, and on the 6th of February in that year, a sheriff's officer took possession of Heale's goods under a *fi. fa.* issued upon this judgment. At the request of Heale, the sale of the goods was postponed till the 4th of April following; but on the 3d of April he committed *503] *an act of bankruptcy, and a commission of bankrupt having afterwards issued against him, his assignees brought the present action to recover from the defendants the proceeds of the sale under their execution.

A verdict having been found for the plaintiffs at the trial of the cause before

Gaselee, J., last Exeter assizes, with leave for the defendants to move to set it aside and enter a nonsuit,

Stephen, Serjt., moved for a rule *nisi* to that effect, on the ground that this case did not fall within the proviso of the 108th section above set out. The judgment on which the defendants had issued execution was not within the letter or the policy of that proviso. Not within the letter; because it was not an execution on a judgment by default,—as it might have been if the action, instead of *assumpsit*, had been debt, in which a judgment by default is final,—but an execution on a final judgment *after* a judgment by default. Not within the policy; because the judgment had not been concerted by the parties to defeat the creditors at large, but was suffered by Heale *in invitum*, because he had no defence to a *bond fide* demand.

Secondly, the judgment was obtained before September 1825, when the act came into operation, and was, therefore, an existing right, which the legislature would not annul without express enactment. There was nothing retrospective in the language of the proviso, which seemed to point almost expressly to judgments to be obtained subsequently to the passing of the act.

Mereuether, Serjt., moved for a similar rule in another cause, similarly circumstanced.

The Court took time to consider, and now judgment was delivered by

*TINDAL, C. J. In this case the defendant applies for a rule to show [*504] cause why the verdict for the plaintiffs should not be set aside, and a new trial be had, on the ground that the judgment and execution on which he relies do not fall within the proviso of the 108th section of the bankrupt act: and consequently, that the execution is protected by the general enactment of the section itself, as having been "served and levied by seizure before the bankruptcy."

It was contended on two distinct grounds, that the case is not governed by the words of the proviso; first, that this is not properly an execution on a judgment by default, but on a final judgment after a judgment by default; and even if it is to be considered as an execution on a judgment by default, the proviso includes only such judgments by default as are suffered by agreement of the parties: secondly, that the proviso relates only to judgments obtained after the act.

But notwithstanding these objections, we think the case falls within the proviso. As to the first, it is to be observed, that the words themselves comprise every species of judgment obtained against a defendant, except judgment after verdict, trial by the record, and on demurrer. The judgment, therefore, on which this execution issued, not being one of any of the latter classes, it is difficult to maintain that it does not fall within those named in the proviso. Nor does it seem less a judgment by default, because a writ of inquiry is interposed between the interlocutory and the final judgment, such writ being no more than an inquest of office to inform the conscience of the Court, who might proceed immediately to ascertain the damages, if they so thought fit. The judgment, therefore, ranging itself under the description of a judgment by default, we do not see by what principle we can restrain the very general words used in the proviso, to judgments of *default by the consent or collusion of the [*505] plaintiff and defendant. It may be admitted that the primary object of the legislature was to provide against the inconvenience felt by the creditors of bankrupts from judgments suddenly entered up, and execution levied on secret warrants of attorney; and that the clause in question, which is copied from the Irish bankrupt act 11 & 12 G. 3, c. 8, s. 4, was introduced principally with that object. But the legislature, when it wished to frame enactments as to warrants of attorney, knew how to describe them by their name, as in the 3 G. 4, c. 39; and again, by using the very general words, "*any* judgment obtained by default, &c.," instead of referring to judgments on warrants of attorney, it appears to us the better inference that more was intended to be included; and that *all judgments by default* must be intended to be comprised, particularly as in all cases

consent and collusion may so easily exist, but be with so much difficulty brought to light.

As to the second objection, the words "obtained by default, &c.," describe as well a judgment then obtained as one to be obtained after passing the act; and as the act in the very same clause, uses words of a future signification,—“provided that no creditor who *shall* sue out execution upon any judgment obtained, &c.”—we think, if the clause had been meant to apply to future judgments only, the legislature would have said, “to be obtained,” or have used a similar expression. And, upon such a construction, it is to be observed, that all executions issued upon judgments entered up before the 1st of September, 1825, on secret warrants of attorney then in existence, would be protected, for which there seems no reason whatever.

On the whole, therefore, we think this execution falls within the enactment of the proviso, and that the rule prayed for by the defendants should not be granted.

Rule refused.

*506]

*ADAMS v. DANSEY. May 4.

1. The plaintiff, an occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes: Held, that this was not a promise required by the statute of frauds to be in writing.
2. The vicar having succeeded in the suit, plaintiff's attorney paid the vicar the costs recovered from the plaintiff. The plaintiff gave his attorney a promissory note for the amount, and before the promissory note became due, sued the defendant: Held, to be sufficient proof of an allegation that the plaintiff had paid the vicar's costs.

THE second count of the declaration stated, That whereas before the time of the making of the promise and undertaking by the defendant as thereafter mentioned, disputes had arisen and were depending between the defendant and divers other persons claiming to be proprietors of land in the parish of Little Hereford, on the one part, and Charles Price, as the vicar of the same parish, of the other part, touching and concerning certain tithes claimed by the said Charles Price as such vicar as aforesaid, to wit, at, &c.; and whereas the said Charles Price, as such vicar as aforesaid, before the time of the making of the promise and undertaking by the defendant thereafter mentioned, had exhibited his certain English bill of complaint in his majesty's Court of Exchequer against the plaintiff and one John Cadwallader, then and there respectively being occupiers of divers lands in the said parish, for receiving the said tithes so claimed by him as aforesaid, whereof the defendant then and there had notice; and thereupon afterwards, to wit, on, &c., at, &c., in consideration that the plaintiff, at the special instance and request of the defendant, would suffer the defendant to defend the said suit in the said Court of Exchequer in the name of the plaintiff (jointly with the name of the said John Cadwallader), the defendant undertook and then and there faithfully promised the plaintiff to save harmless, and indemnify him from all payments, damages, costs, and expenses, which he should or might incur, bear, pay, sustain, or be liable for, by reason of the

*507] said suit in the said Court of Exchequer *being so defended; and that he, confiding in the said promise and undertaking of the defendant, did afterwards, to wit, on, &c., at, &c., suffer the defendant to defend the said suit in the said Court of Exchequer in the name of the plaintiff (jointly with the name of the said John Cadwallader), and the same suit was then and there so defended as aforesaid, and had since ended and determined, to wit, at, &c.; and the plaintiff averred, that he, under and by virtue of a certain decree made in the said suit, was forced and obliged to pay and did then and there pay unto the said Charles Price a certain large sum of money, to wit, 84*l.*, for certain costs in the said last-mentioned suit; and was also then and there forced and obliged to pay and did pay a certain other sum of money, to wit, 3*l.* 17*s.* 2*d.*, being the costs of and incident to a certain attachment then and there issued against the plaintiff out of the said Court of Exchequer, to compel payment of the costs of the said last-

mentioned case; whereof the defendant afterwards, to wit, on, &c., at, &c., had notice; yet the defendant, disregarding his said promise and undertaking so by him made as aforesaid, and contriving and fraudulently intending craftily and subtilly to deceive and defraud the plaintiff in that respect, did not nor would, although often requested so to do, save harmless or indemnify the plaintiff from the said costs, charges, and expenses, so by him the plaintiff paid as aforesaid, but had wholly refused and neglected so to do, to wit, at, &c.

At the trial before Vaughan, B., last Worcester assizes, it appeared that the plaintiff Adams, as occupier of certain lands in the parish of Little Hereford, had been sued for tithes by Price the vicar. The landowners of the parish, relying on a modus, resolved that the vicar's suit should be resisted, and for that purpose agreed to contribute to the expenses in the same *proportions as they were rated to the poor's rates: they then requested the plaintiff and the other occupiers to persist in defending the suit. [*508 The plaintiff refused, as he had quitted the parish since the commencement of the suit; whereupon the defendant orally agreed to indemnify him.

The plaintiff then consented to defend the suit. The vicar having recovered, the plaintiff's attorney paid the vicar the costs he was entitled to claim from the plaintiff, as well those incurred before as those incurred subsequently to the defendant's promise of indemnity. The plaintiff gave his attorney a promissory note for the amount so paid to the vicar; but this promissory note was not discharged till after the commencement of the present action.

A verdict having been found for the plaintiff on the second count of the declaration,

Russell, Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or to reduce the damages to 25l., the sum paid for costs incurred subsequently to the defendant's promise, on the ground that, as an undertaking to be answerable for the debt of a third person, it was void under the statute of frauds for want of a writing; that there had been no payment of the debt, as alleged in the second count, the plaintiff not having discharged the promissory note he gave to his attorney till after the commencement of the present action; and that, at all events, there was no consideration for the promise to indemnify, as far as concerned the costs incurred before the promise.

Wilde, Serjt., who showed cause, contended that the costs for which the plaintiff became liable to the vicar were the plaintiff's own debt, or liability, for the *payment of which, whether as an actual or contingent charge, he had a right to stipulate before he permitted his name to be used for the purposes [*509 of the landowners.

Then, the allegation of payment had been sufficiently proved by showing that the vicar had been paid. Payment by the plaintiff's attorney was the same thing as payment by the plaintiff; and the mode in which the plaintiff settled with his own attorney, whether by a promissory note or otherwise, was immaterial.

Russell in support of his rule. At the time the defendant entered into the agreement the vicar's suit had not been determined, and it could not be known whether the plaintiff would have to pay costs to the vicar, or the vicar to the plaintiff; and if the cause had been decided against the vicar, the defendant, according to his agreement, must have been responsible for the vicar's default, in case the vicar had failed to pay the plaintiff's costs. The agreement therefore, as to that contingency at least, ought to have been in writing under the statute, and if so, it ought to have been in writing for the whole, for the agreement is entire, and cannot be severed. *Lexington v. Clarke*, 2 Ventr. 223, *Chater v. Beckett*, 7 T. R. 201. Had the agreement been confined to the plaintiff's own costs it might have been otherwise. But in *Winkworth v. Mills*, 2 Esp. 484, it was held that a promise by the endorser of an unpaid note to indemnify the holder if he would proceed to enforce payment against the other parties to the note, was void under the statute of frauds unless evidenced by writing. That was a promise to pay a plaintiff's expenses; the present is to pay a defendant's; and

*510] there can be no difference in *principle between the two. *Howes v Martin*, 1 Esp. 162, is distinguishable, on the ground that the plaintiff had accepted bills for the accommodation of the defendant, and was therefore entitled to all expenses occasioned by such bills.

But the averment of payment by the plaintiff has not been proved. The promissory note given by him to his attorney was merely a security, not a payment. Such a security cannot be treated as money, *Maxwell v. Jameson*, 2 B. & A. 51, *Taylor v. Higgins*, 3 East, 169, except by the consent of the parties, as in *Pickard v. Bankes*, 13 East, 20.

TINDAL, C. J. This rule has been obtained on two grounds: first, that the defendant's promise was an undertaking within the statute of frauds, and that, the promise not having been reduced to writing, the plaintiff could not recover; secondly, that the allegation of payment by the plaintiff has not been made out in proof, the evidence showing no payment by the plaintiff till after the commencement of the action.

We think that neither objection can be sustained. This was not a promise within the statute of frauds. The words of the statute are, "No action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement on which such action shall be brought, or some note or memorandum thereof, shall be in writing," &c. Here, as between Adams and Dansey, what promise is there as to the debt, default, or miscarriage of another? It is a direct promise to repay Adams any money which might be paid by him for costs in the suit between the vicar and Adams. It has been urged that, at all events, the *511] *promise would not be available for costs antecedently incurred. But it was competent to the plaintiff to make any bargain he pleased as the price of his resisting the tithe suit for the benefit of the defendant.

Then, has there been any payment of costs within the terms of the second count? The plaintiff's attorney made the payment to the vicar, the successful party in the tithe suit; and though it is true the plaintiff had not repaid his own attorney at the time of this action, yet, inasmuch as the party entitled had been satisfied, and could make no further claim, the payment had clearly been made. The plaintiff's attorney was his agent for the purpose of making that payment, and it is immaterial in what way he afterwards settles the account with his principal.

GASELEE, J.(a) The averment of the payment of costs to the vicar is fully proved by the payment of the plaintiff's attorney in 1823; it was a payment by an agent, and it is not necessary to consider the effect of the promissory note given by the principal in settling the account with his agent.

As to the other point, the answer has been given by my Lord Chief Justice. This is not an undertaking for the debt, default, or miscarriage of another, it is for a liability to which the plaintiff himself was to be exposed at the request of the defendant. But there is a sufficient consideration even for the by-gone costs, for the vicar's claim had been resisted at the instance of the defendant, and the plaintiff was at that time liable in case the vicar should succeed.

BOSANQUET, J. I agree on both points. The plaintiff, on allowing his name *512] to be used for the purposes of *the defendant, was at liberty to impose such terms as he pleased, either as to the past or the future costs, and the debt for the discharge of which he stipulated was his own debt, not that of a third person.

The other question is, not whether the promissory note was treated as money between the plaintiff and his agent, but whether the party who succeeded in the tithe cause had been paid his costs.

He was paid by the plaintiff's agent, and payment by the agent is payment by the principal. After payment by his agent, the plaintiff, as liable to his agent, was damaged, and entitled to sue the defendant.

The rule must be

Discharged.

(a) Park, J., was at Chambers.

WILLANS v. TAYLOR. May 5.

The defendant sent the plaintiff a copy of a bill of exceptions, in order to his concurring in the statement of facts, and, at the same time, sued out a writ of error: Held, that the plaintiff had no right to retain the bill of exceptions, in order to frustrate it, on the ground that the defendant had waived it by suing out a writ of error.

UPON the trial of this cause, at the Middlesex sittings on the 23d of December last, a bill of exceptions was tendered on the part of the defendant, and reduced to writing before the cause was over. The bill of exceptions in an extended form was, at the suggestion of the Chief Justice, sent to the plaintiff's attorney on the 11th of February following, in order that he might agree to it or suggest alterations before it was signed by the Chief Justice, who had presided at the trial. On the same day the defendant, who had also brought a writ of error, gave a rule to transcribe.

The plaintiff having taken no notice of the copy of *the bill of exceptions, a Judge's order was obtained, calling on him to return it to the [*513 defendant.

Cross, Serjt., obtained a rule nisi to discharge this order, on the ground that the defendant, by bringing a writ of error, had waived his bill of exceptions; for which he cited *Dillon v. Parker*, 1 Bingh. 17.

Taddy, Serjt., showed cause. *Dillon v. Parker* was an application to a court of error, and the court decided on the ground that they had no authority to interfere, for the application should have been to the court below. Wood, B., was the only Judge who expressed an opinion that the writ of error was a waiver of the bill of exceptions. (See 11 Price, 102.) A position which can scarcely be supported, since the writ of error is necessary to save the party from an execution before his bill of exceptions has been heard. This is an application to the discretion of the Court, and if there has been no unnecessary delay, the defendant will not be deprived of his bill of exceptions. In *Dillon v. Parker* a year had elapsed; errors had been assigned; and the application was to compel the party to settle the bill of exceptions, not simply to return it as here.

Wilde, Serjt., on the same side, was stopped by the Court.

Cross and Andrews, Serjts., relied on *Dillon v. Parker*, and complained of the delay from the end of December to the last day but one of Hilary term.

TINDAL, C. J. The cause was tried on the 23d of December; the bill of exceptions was drawn up and *tendered before the cause was over; on [*514 the 11th of February the bill was presented in an extended form to the Judge who presided, and at his suggestion a copy was furnished to the other side, to ascertain if it met their view of the case. It has not been contended that the bill ought to have been reduced to form before the expiration of the first four days of the term, and the utmost delay that can be complained of is from the 28th of January to the 11th of February. That is not such delay as to entitle the party to retain and take no notice of a paper sent to him for approval or disapproval, and which, whether he agree or disagree with its contents, must be submitted to the Judge who presided, for his acceptance before signature. The question, whether a court of error will attend to a bill of exceptions appended to a writ of error, does not arise upon the present occasion, and no ground has been shown for discharging the Judge's order.

PARK, J. The party who has tendered the bill of exceptions is entitled to have it returned; and whether the other side agree to it or not, the Judge who presided must exercise his discretion as to signing it, and he is not bound to sign if the statement of facts be erroneous. When he shall have signed, it will be for the court of error to say, whether they will admit it or not.

GASELEE, J. The party ought not to retain this paper: he is bound to express his assent or dissent, and then to return it.

BOSANQUET, J., concurring, the rule was

Discharged.

*515]

*TOPHAM v. DENT. May 6.

Plaintiff, a prisoner, assigned all his effects, under the insolvent debtors' act, June 17. His wife continued to reside in his house, retaining some of the furniture. On the 9th July, the wife having been absent for two days, and no one being in the house, defendant committed a trespass in an attempt to distrain for rent : Held, that the wife had not a sufficient possession to enable the plaintiff to sue in trespass.

TRESPASS. The defendant, as the bailiff of Imber, went on the 9th of July last to a house which Imber had let to the plaintiff, to distrain for rent arrear. Finding the door closed and the house empty, he picked the lock, and made a distress, but the whole effects in the house were insufficient to cover the sum in arrear, 12*l*. The plaintiff was in prison, and his wife, who had continued to reside in the house after he went to prison, had not been seen there for two days, but was sent for at her mother's, where it appeared she was staying.

The plaintiff had petitioned the insolvent debtors' court for his discharge on the 17th of June, when his interest in the premises was assigned to the provisional assignee, and the effects now distrained were all inserted in plaintiff's schedule.

A verdict having been found for the defendant, at the Middlesex sittings after last Michaelmas term, on the ground that the plaintiff had neither property nor possession to maintain trespass,

Andrews, Serjt., moved to set it aside, on the ground that the house was constructively in the possession of the plaintiff, his wife being near at hand, and apparently in the actual occupation, though at the moment on a visit to her mother.

Wilde, Serjt., who showed cause, argued, that after the assignment to the provisional assignee, the plaintiff had no longer any property in the house, and *516] could not sue except by the consent of his assignees. The *interest in the term and in the goods all passed to the assignee: *Doe v. Andrews*, 4 Bingham 348, *Crofts v. Pick*, 1 Bingham 354.

Andrews, in support of his rule, argued, that the absence of the wife for a short interval, as on a visit, did not interrupt the constructive possession of the premises, which must be taken to have been enjoyed with the assent of the assignee, unless the contrary appeared.

TINDAL, C. J. I am of opinion, that this verdict ought not to be disturbed. In order to maintain the action, the plaintiff ought to have had possession actual or constructive; but in the present case, the property was all out of the plaintiff. His term was vested in the assignee by the assignment of June 17th, and the goods were all enumerated in the plaintiff's schedule. The property not being in him, had he the possession? So far from it, he was in prison, and his wife had not been on the premises for two days; and it would be too much to say that her being accidentally called for on the occasion of the distress amounted to a constructive possession with the assent of the assignee.

PARK, J., concurred.

GASELEE, J. The interest in the house was vested in the assignee, and the action would not lie without clear evidence that the wife at least was in possession with the assent of the assignee. No such evidence was given at the trial, and therefore the rule must be discharged.

BOSANQUET, J., concurring, the rule was

Discharged.

*517]

*BRIGGS v. SHARP. May 8.

The decision of a Judge of assize in remanding a prisoner under the Lords' act is final up to the time of remanding.

THE defendant, a prisoner in Lincoln gaol, was brought up at the last Lincoln assizes, before the Judge of assize, under the Lords' act, and remanded, on the plaintiff opposing his discharge, and giving a note to allow him his expenses.

Ludlow, Serjt., had obtained a rule *nisi* for his discharge, on the ground, as appeared by affidavit, that the plaintiff had not signed the note in Court; that no affidavit, verifying the plaintiff's signature to the note for the allowance of the sixpences had been delivered to the defendant; and that the note itself had been delivered to him, not in Court, but by the gaoler after he returned to prison.

It appeared, however, that the affidavit with the note attached to it, had been handed up to the Judge for his inspection.

Goulburn, Serjt., showed cause. The matter has been determined by the Judge of assize, the only competent tribunal; and this Court has no authority to interpose except in matters occurring subsequently, as the non-payment of the sixpences.

From the statement, however, that the affidavit was handed up to the Judge for his inspection, it may be presumed that the affidavit had reached the prisoner's hands, and that he had suggested some inquiry.

Ludlow in support of his rule contended, that the Court had authority to investigate the proceedings below; and that they would be astute to favour the liberty of the subject.

*TINDAL, C. J. I think we have no authority to interfere in this case. [518] The statute enacts, that the Court shall make a rule to discharge the insolvent upon his executing an assignment of his property, unless the creditor insist upon his being detained, and agree in writing to pay him 3s. 6d. a week. (a)

Upon this enactment the Courts have introduced, as a matter of practice, that the note given by the plaintiff shall be signed in open court, or that his signature shall be verified by affidavit. But, first, we must intend that the court below pursued the regular practice, and no case of application to the court above can be cited which has not arisen upon matter subsequent to the remanding of the prisoner; and, secondly, there is enough before us to lead us to infer, that what was done was done correctly. It is not probable that the affidavit and note would have been handed up to the Judge except to enable him to satisfy himself upon some objection taken by the prisoner.

PARK, J. I am of the same opinion. However inclined to assist a prisoner, we must not take upon ourselves a jurisdiction that is not in us. Except for matter arising subsequently, the act precludes us from entering on a case after the Judge of assize has dealt with it. And here we may presume he dealt with it correctly, for except upon objection by the prisoner, it is not probable the affidavit and note should have been handed up to the Judge.

GASELEE, J. The power of discharging or remanding the prisoner rests solely with the Judge of assize; and after he has remanded, the Court here cannot discharge, except upon the failure of the plaintiff to *perform his undertaking. [519] The course of the Judge of assize has varied occasionally, according to the practice of the place. But the words of the act have in this instance been strictly complied with. The Judge must have inquired into the case; for except upon some objection it is not likely the documents would have been handed up to him, and his direction respecting them would be final.

BOSANQUET, J. I have entertained some doubts, because the note was not handed to the prisoner till his return to the prison; and the affidavit, as it is stated, not at all, which is contrary to the ordinary practice: at the same time they were handed to the Judge in Court, so that there was no want of compliance with the words of the act. After he has exercised his judgment on the facts, I agree that this Court has no power to review his decision, and on that ground I think the rule should be discharged.

Rule discharged.

DICAS v. JAY. May 10.

Plaintiff had sued defendant for negligence, *per quod* plaintiff became liable to pay certain sums, and lost the custom of A., B., and C.

The cause was referred under an order of N. P., by which plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of plaintiff, who nevertheless sued defendant again, the new declaration differing from the old one, in stating that plaintiff had paid the money he before alleged himself liable to pay, and had lost the custom of D., E., and F.:

Held, that the Court could not stay proceedings on a summary application.

THE plaintiff, in a declaration of several counts, had sued the defendant for negligence as an attorney in the conduct of a suit; and alleged that he the *520] plaintiff *had incurred certain liabilities as the consequence of this negligence, and had lost the employment of certain persons who would otherwise have employed him.

The matter was, by an order of *Nisi Prius*, afterwards made a rule of Court, referred to an arbitrator, who directed a verdict generally for the plaintiff for 23*l.* 14*s.* 10*d.* The order by which the cause was referred precluded the plaintiff from bringing any new action.

The plaintiff, however, now commenced a fresh action against the defendant, the declaration in which was the same as in the preceding action, with the addition, that the plaintiff alleged himself to have paid certain sums, for which he had before only alleged himself to be liable, and named certain other persons who had ceased to employ him in consequence of the defendant's negligence.

Cross, Serjt., obtained a rule *nisi* to stay the proceedings in this second action, on an affidavit alleging that it was brought for matters which were included in the award. In *Dunn v. Murray*, 9 B. & C. 780, the declaration stated, that in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of five guineas per week throughout the year, defendant undertook to employ him for a year, and alleged as a breach, that the defendant dismissed the plaintiff from his employ before the end of the year, without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages he would have been entitled to receive from *521] *the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal, might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages in consequence of the dismissal from the defendant's employ before the end of the year, it was held, that the award of the arbitrator was a bar to such action.

Wilde, Serjt., who showed cause, relied on an affidavit in which it appeared that the learned Judge before whom the former cause was about to be tried had expressed an opinion, that the damage complained of in the present action might form the subject of a second suit. He pointed out the difference between the two declarations as above; and contended, that the Court would not try summarily, on affidavit, a doubtful question, which the defendant might bring to issue by pleading.

Cross, Serjt. This action is a violation of the rule of Court, for which the plaintiff is liable to an attachment; but, if the defendant waives the graver proceeding, the Court may interfere in support of its own order.

TINDAL, C. J. This is an application to stay proceedings, on the ground that a former action for the same cause has been referred to an arbitrator under a rule of Court, and that this proceeding is a violation of that rule. It is, therefore, only a milder mode of moving for an attachment. When the former cause was referred, the learned Judge who was about to try it expressed an opinion, that

the damage now complained *of might form the subject of a separate action. Under these circumstances, it is difficult to say that the plain- [*522
tiff is guilty of a contempt in bringing a second action, although, upon looking at the plaintiff's declaration, we think it would be mercy to him to make this rule absolute with costs. But we have no right to prevent him from proceeding if he chooses to do so, and therefore this rule must be discharged without costs.

PARK, J., said he had considerable doubts.

GASELEE, J. I am of opinion, that the recovery in the first of these actions may be pleaded in bar to the second; and I therefore agree that it would be mercy to the plaintiff to make this rule absolute; but as we cannot go the length of saying there has been a wilful violation of the order of Court, the rule must be discharged if the plaintiff insists on proceeding.

BOSANQUET, J., concurred.

Rule discharged.

MAXWELL v. MARTIN. May 10.

Trespass for breaking a close called Lord's Leys. Plea, right on Brockeridge Common, and that Lord's Leys was part of the common. Replication, no right on Lord's Leys. At the trial, plaintiff admitted that defendant had a right on all Brockeridge Common except the portion called Lord's Leys, and defendant admitted he had no evidence of any exercise of the right on Lord's Leys:

Held, that upon these pleadings and admissions, plaintiff was entitled to judgment.

TRESPASS for breaking and entering plaintiff's close, called the Lord's Leys.

Plea, that the supposed close called Lord's Leys is *and at the said [*523
several times when, &c., was an open waste, and considered part of a certain common called Brockeridge Common; and that defendant, and those whose estate he had, had a right to take stone from the open waste and unenclosed parts of Brockeridge Common, and in, upon, and from the Lord's Leys, as being an open, waste, and unenclosed part of Brockeridge Common.

The replication (after protesting that Lord's Leys was not an open, waste, and unenclosed part of Brockeridge Common) alleged, that defendant and those whose estate he had, had not a right to take stone from the close or parcel of land called the Lord's Leys. Upon which issue was joined.

At the trial the cause was conducted by admissions on both sides: the counsel for the defendant admitting, that he had no evidence to prove the exercise of a right to take stone on the Lord's Leys; and the counsel for the plaintiff admitting, that the defendant had a right to dig stone upon Brockeridge Common, with the exception of the parts of it called the Lord's Leys; it being understood, according to the report of the learned Judge who tried the cause, that there was no fact in dispute between the parties for the consideration of the jury.

On this state of the pleadings, and these admissions as to the evidence, the verdict was entered for the defendant, with liberty for the plaintiff to move to enter a verdict for 1s. damages.

Accordingly,

Russell, Serjt., having obtained a rule nisi to that effect,

Ludlow, Serjt., showed cause. The plaintiff not having traversed the defendant's right to take stone on Brockeridge Common, has, on the pleadings, admitted it; *and for want of a traverse, he has also (notwithstanding the *protestando*) [*524
admitted on the pleadings that the Lord's Leys is part of Brockeridge Common, and as every whole must contain all its parts, the admission of the right on Brockeridge Common involves the admission of a right on Lord's Leys as part of the common. It is impossible, therefore, that any judgment can be entered for the plaintiff on this record. In *Moorewood v. Wood*, 4 T. R. 157, it was held, that, if to an action of trespass in the common called A. the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. And in *Rotheram v. Green*, Cro. Eliz. 593, where the defendant pleaded a right

of common in respect of a tenement in L., and the jury found that the defendant's ancestor released to the plaintiff's ancestor all his right and common in part of the land where he had the common, the Court held that "the common is entire through the whole land, wherefore a release in part shall discharge the whole," "and therefore the prescription is found against the defendant." Evidence of ownership, or of rights upon some parts of a waste, is, until rebutted, evidence of a right over the whole. *Tyrwhitt v. Wynn*, 2 B. & A. 554, *Stanley v. White*, 14 East, 332, *Grose v. West*, 7 Taunt. 39, *Rowe v. Brenton*, 8 B. & C. 737.

Wilde, Serjt., and *Russell*, in support of the rule. The qualified admission by the plaintiff's counsel of the defendant's right on Brockeridge Common, coupled with the admissions made by the defendant, threw it on him to make out the affirmative, that he had a right on Lord's Leys. The present resistance is an attempt to elude by finesse the understanding come to by both parties on the trial.

*525] *The Court took time to consult Vaughan, B., before whom the verdict was taken, and judgment was now delivered by

TINDAL, C. J. Upon the pleadings in this case, the precise issue raised by the replication is, Whether the defendant has a prescriptive right to dig stone in, upon, and from the close called the Lord's Leys; and it is admitted on the face of the pleadings, for the purpose of this cause, that the Lord's Leys was, at the time of the trespass committed, an open, waste, and unenclosed part of a certain common called Brockeridge Common.

The cause, instead of being tried by the actual production of evidence before the jury, was brought to a termination by the admission of the counsel on each side: the counsel for the defendant admitting, that he had no evidence to prove the exercise of a right to take stone on the Lord's Leys: and the counsel for the plaintiff admitting, that the defendant had a right to dig stone upon Brockeridge Common, with the exception of the parts of it called the Lord's Leys: it being understood, according to the report of the learned Judge who tried the cause, that there was no fact in dispute between the parties for the consideration of the jury.

On this state of the pleadings, and this mutual understanding of the condition in which the parties stood as to the evidence, the verdict was entered for the defendant, with liberty for the plaintiff to move to enter a verdict for 1s. damages, which is now sought to be done on the rule obtained for that purpose, and which rule, we think, ought to be made absolute.

The original grant of the right of digging stones upon Brockeridge Common, on the foundation and in the place of which grant the prescription now stands, might either have been a general grant to dig stone over the whole common, or *526] a grant to dig stone over the whole *common, with the exception of the Lord's Leys. But the affirmative of the issue is upon the defendant. He must show affirmatively, either that the original grant, or the prescriptive right set up in the plea, does comprehend the whole common without any exception. So that, if the original grant cannot be produced, and the evidence as to the prescriptive right over the part called the Lord's Leys hangs in even scales, the balance must be declared in favour of the plaintiff, inasmuch as the burden of making the scale preponderate is cast upon the defendant.

Now, if the case had gone to the jury upon the actual production of evidence, the right to take stones upon the Lord's Leys would have depended, not merely on affirmative evidence of the exercise of that right on the particular spot; but as the defendant had evidence of the exercise of the right of getting stone on the whole of Brockeridge Common, the jury might have inferred the right as to the particular spot in dispute, from the mode and circumstances under which the right was exercised over the residue of the common, and not exercised as to the Lord's Leys. Thus, the situation of the Lord's Leys, the quantity and value of the stone under it, its accessibility or convenience with respect to the tenement of the defendant, might have been important evidence, either to sup-

port or to negative the inference as to the exception of the Lord's Leys from the original grant, or from the prescriptive right.

But as this was well known to the counsel on both sides, we take the admission made at the trial as a general admission, not only that there was no direct affirmative evidence to support the issue as to the Lord's Leys, but none that would raise an inference in support of it; and, therefore, upon the whole, we think the defendant has not proved his issue, and that the rule obtained must be made absolute. Rule absolute.

*FORSTER and Another v. WESTON. May 10. [527]

Defendant having been arrested for 1123*l.*, when the plaintiffs had the means of knowing that only 716*l.* was due, was held entitled to his costs under 43 G. 3, c. 46, although the accounts between plaintiffs and defendant were somewhat complex.

THE defendant was arrested for 1123*l.*, and the plaintiffs at the trial consented to take a verdict for 716*l.*

Wilde, Serjt., obtained a rule nisi to tax the defendant his costs under 43 G. 3, c. 46, as for an arrest without probable cause, upon affidavits which alleged that at the time of the arrest the plaintiffs had in their hands 407*l.* of the defendant's money, which reduced their real demand to 716*l.*, the sum recovered; that the account on which this balance was due stood in the joint names of the defendant and another, but that the plaintiffs had, upon an arrangement between them, been accustomed to pay each of them separately a moiety of the sums that became due to the two. He cited *Dronefield v. Archer*, 5 B. & A. 513.

The plaintiffs in answer alleged that the defendant was about to leave the country when he was arrested. They admitted that 407*l.* was due to the defendant as his moiety upon the joint account, and did not expressly deny that they knew this to be the amount of his moiety at the time of the arrest.

Taddy, Serjt., who showed cause, contended that there was no ground for calling this a malicious or vexatious arrest, since the disproportion between the sum sworn to and the sum recovered was not immoderate, and the plaintiffs might well have been misled by the joint account. [528]

TINDAL, C. J. I think this case falls within the statute of 43 G. 3, and that the plaintiffs had not reasonable or probable cause for arresting the defendant for 1123*l.* If, indeed, they had really believed that they were not safe in dividing the joint account, that might have given a different complexion to the affair; but they admit that they afterwards divided the amount, and they have not stated that they did not know it was to be divided previously to the arrest.

PARK, J. The balance is the sum due. The plaintiffs knew that something was due from them to the defendant which would reduce the amount for which they arrested him, and they had no probable cause for arresting him for more than the balance. In a great variety of decisions it has been laid down that the rule upon these motions is the same as in actions for a malicious arrest.

The rest of the Court concurred, and the rule was made Absolute.

*CHALIE and Another v. BELSHAW. May 10. [529]

Averment, that defendant accepted a bill, sufficient on special demurrer, although the stat. 1 & 2 G. 4, requires an acceptance in writing.

THE declaration stated that the defendant, according to the usage and custom of merchants, accepted a bill of exchange drawn by the plaintiffs, and thereupon became liable to pay the amount according to the tenor of the said bill.

Breach, non-payment. Special demurrer, on the ground that it was not

stated that the defendant accepted the bill of exchange in writing, or that the acceptance of the same was in writing; and also for that it was stated that the defendant accepted the bill of exchange according to the usage and custom of merchants, and by the usage and custom of merchants an acceptance by parol without writing would have been sufficient, whereas by a certain act of parliament passed in the first and second years of the reign of King George the Fourth, the acceptance of the bill of exchange, to be valid, must be in writing.

Jones, Serjt., in support of the demurrer, urged that the declaration ought to state all that the statute required. But

The Court held the declaration sufficient, and that there was nothing in the objection.

Judgment for the plaintiff.

*530]

*MURRAY v. NICHOLS and Others. May 10.

In an action on the case for a malicious prosecution, *per quod* plaintiff was falsely imprisoned, one of several defendants obtaining a verdict, is not entitled to his costs under 8 & 9 W. 3, c. 11, if a verdict pass against the others.

THE plaintiff had sued the defendants in case; and his declaration contained counts for a malicious prosecution; counts for a libel; and trover for a trunk. In the count for a malicious prosecution he had stated his imprisonment as a consequence and aggravation of the malicious charge.

A verdict was found for the plaintiff against some of the defendants, while others were acquitted, but the prothonotary having declined to allow them their costs,

Jones, Serjt., obtained a rule *nisi* to review his taxation; against which

Wilde, Serjt., was to have shown cause, but the Court called on

Jones to support his rule. At common law where a verdict was found against one of several defendants in an action of *tort*, the others who were acquitted had no claim for costs. To remedy this the statute 8 & 9 W. 3, c. 11, s. 1, gives costs to any of several defendants who obtain a verdict in actions of trespass, assault, false imprisonment, and *ejectione firmæ*. This statute, considering the reason of its passing, ought to be construed liberally, and with a view to the object, not the form, of the action in which a defendant may be engaged; for if it had been intended that the remedy should have been confined to the form of action, it would have been only necessary to specify the action of trespass, since that includes all that are named in the statute. But

*531] it was *meant to give the costs wherever a false imprisonment was the subject of the action, whether under the form of trespass or case; and here the declaration stated that the plaintiff was falsely imprisoned. In *Dibben v. Cooke*, 2 Str. 1006, the Court said, "Before the statute of 8 & 9 W. 3, c. 11, if one defendant was acquitted, he was not entitled to his costs, the Courts construing the former acts to relate only to the case of a total acquittal of all the defendants. This being inconvenient, the 8 & 9 W. 3, c. 11, came, and gave costs where one of the defendants is acquitted, unless the Judge certifies a reasonable cause to make him a defendant. And that act extends to trespass, assault, false imprisonment, and ejectionment." But the action there being for a nuisance, the Court thought it did not come within the act. *Ingle v. Wordsworth*, 3 Burr. 1284, where the costs were refused, was an action of replevin; and *Marriner v. Barrett*, cited in that case, was an action of trover. But no case has decided that costs shall be withheld where false imprisonment is the subject, though not the form of the action.

TINDAL, C. J. The rule cannot be laid down with greater accuracy than by Lord Hardwicke in the case referred to. "The act extends to trespass, assault, false imprisonment, and ejectionment. The present action is trespass on the case; and though that be a species of trespass, and in the case of the statute of limitations, the word *trespass* in the proviso has been extended to

actions on the case; yet, considering these acts giving costs have always been looked on as penal acts not to be extended by equity, and, therefore, an avowant not within the word plaintiff, Carth. 179, we must take it only to mean the general sort of trespass *vi et armis*: 10 Rep. Marshalsea case." And the question is, whether this act can be *construed in the manner now required. The words of the act are, "where several persons shall be [532 made defendants to any action, or plaint of trespass, assault, false imprisonment, or *ejectiones firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit in like manner as if a verdict had been given against the plaintiff or plaintiffs and acquitted all the defendants, unless the Judge, before whom such cause shall be tried, shall immediately after the trial thereof, in open Court, certify upon the record under his hand, that there was a reasonable cause for the making such person or persons a defendant or defendants to such action or plaint." And it appears to me that this declaration does not come within those words. An action of false imprisonment means an action brought directly for the imprisonment; but here the imprisonment is stated only as matter of aggravation incidental to the principal charge; it is clearly not the gist of the action, and the very beginning of the declaration, "was attached to answer the plaintiff for plea of *trespass on the case*," puts the defendant out of Court.

PARK, J., and GASELEE, J., concurred.

BOSANQUET, J. By the action of false imprisonment, the statute meant an action brought for the imprisonment directly, and not as consequential damage.

Rule discharged.

*FENN dem. THOMAS THOMAS v. GRIFFITH and Another. [*533
May 10.

Ejectment. Plaintiff's witness proved an acknowledgment by the defendant, that he held under T., and stated that he, witness, had drawn an agreement touching the premises between plaintiff and T.:

Held, that plaintiff was bound to produce the writing.

EJECTMENT. At the trial before Goulburn, Serjt., last Pembroke great sessions, the lessor of the plaintiff claimed under a lease from the mayor, bailiff, and burgesses of Tenby made in 1788, which was put in and read. A witness for the plaintiff then proved, that the defendants succeeded to and claimed under Alexander Thomas, who occupied the premises before them. The witness said he had drawn an agreement or lease concerning the premises, between the lessor of the plaintiff and A. Thomas: he had often heard A. Thomas say he held the premises under the lessor of the plaintiff, but never heard him say anything about the agreement or lease. The defendant had received a notice to quit without objection. The writing mentioned by the witness was not produced, but a verdict having been taken for the plaintiff, with leave for the defendant to move to enter a nonsuit,

Russell, Serjt., obtained a rule *nisi* accordingly, on the ground, that it having appeared by the plaintiff's own witness that the premises had been demised by a writing, it ought to have been produced as the best evidence of the duration of the term: *Brewer v. Palmer*, 3 Esp. 213.

Ludlow, Serjt., showed cause. There was no reason for producing the writing unless it had also appeared to apply to the time of which the witness was speaking. It might have been an expired lease; and the defendant had never himself acknowledged its existence. At all events, there was no question here about the terms of *the writing, the only dispute was, whether the defendant held under the plaintiff, and that was virtually admitted by his [*534 not objecting to the notice to quit.

In *Brewer v. Palmer*, the plaintiff was not permitted to recover in an action for use and occupation, without producing a written instrument under which the defendant held; but that case is distinguishable on the ground, that the amount to which the plaintiff was entitled must have been expressly specified in the instrument.

TINDAL, C. J. The plaintiff here, who claimed an interest adverse to the defendant, ought to have produced the writing when its existence was shown by his own witness.

PARK, J. As the plaintiff's own witness stated there was a writing, the Court was bound to see the nature of the instrument.

BOSANQUET, J.(a) I am of the same opinion: the plaintiff himself made the writing material, and ought to have produced it. Rule absolute.

(a) Gaselee, J., was at Chambers.

FORD v. BERNARD. May 12.

Demand of particulars of a notice of set-off delivered after a plea which was a nullity: Held, no waiver of the plaintiff's right to sign judgment.

DEBT. The defendant pleaded *non assumpsit*, and gave notice of set-off. The plaintiff took out the summons for particulars of the set-off, but afterwards signed judgment as for want of a plea. The action was brought to recover 6*l.* 1*s.*

Bompas, Serjt., with an affidavit of merits, obtained a rule nisi to set aside *535] this judgment, on such terms as the *Court should impose. He contended that the plaintiff had waived the irregularity of the plea of *non assumpsit*, by taking out a summons for the particulars of set-off. In *Margerem v. Makilwaine*, 2 N. R. 509, it was held, that the plaintiff by taking the plea out of the office, waived the objection that it was a nullity.

Wilde, Serjt., showed cause. This plea is not merely irregular but null, and there can be no waiver of a nullity. In *Margerem v. Makilwaine*, the plea was good on the face of it, and merely irregular as not having been put in by the attorney in the cause.

Bompas. After an affidavit of merits, it has always been the practice to allow the defendant to try the cause upon *some* terms; as, paying all costs and putting the plaintiff in the same situation.

TINDAL, C. J. This judgment is regular; the defendant has put in a plea not adapted to the nature of the action. It has been decided that *non assumpsit*, if pleaded to a declaration in debt, is a nullity; (a) and we do not think any waiver of this nullity has taken place, by the plaintiff's afterwards calling for the particulars of a notice of set-off; the notice forms no part of the record, and what has been done does not affect the matter on record. There is a manifest distinction between a mere nullity, and a plea good on the face of it, which was the case in *Margerem v. Makilwaine*.

It comes then to the question, whether we are in all cases to set aside a regular judgment upon a mere affidavit of merits, and imposing terms on the defendant. Before doing so, we may no doubt look into the particulars of the cause, and *536] when we find that this is an *action to recover no larger a sum than 6*l.* 1*s.*, and the defendant asks us to allow him to pay a considerable amount for the purpose of going to trial, we think it mercy to him to discharge the rule.

Rule discharged, with leave for the prothonotary to inquire into the case.

(a) See *Perry v. Fisher*, 6 East, 549.

TAYLOR and Another, Assignees of MELLERS, an Insolvent,
v. LANYON. May 14.

A landlord, who seizes his tenant's goods under an execution, the proceeds of which he is obliged to refund to the assignees of the tenant under 7 G. 4, c. 57, s. 34, cannot retain against the assignees the amount of a year's rent under the 8 Ann. c. 14, s. 1.

THIS was an action of *indebitus assumpsit*.

The declaration contained counts for money had and received by the defendant to the use of the insolvent; money lent and advanced, and paid, laid out, and expended by the insolvent for the use of the defendant; and upon an account stated between the defendant and the insolvent. Also counts for money had and received by the defendant to the use of the plaintiffs, as assignees of the said insolvent; and upon an account stated between the defendant and the plaintiffs, as assignees as aforesaid. The defendant pleaded the general issue.

At the trial of the cause before Tindal, C. J., London sittings after Easter term last, a verdict was found for the plaintiffs, damages 180*l.*, subject to the opinion of the Court on the following case:—

The insolvent, before and at the time of the issuing of the writ of execution thereafter mentioned, was possessed of a certain house in Norfolk Street, Strand in the county of Middlesex, as tenant thereof to the defendant, under a lease for a term of years, then unexpired; and also of certain goods and chattels, being the furniture in the said house.

*On the 31st of May, 1828, the insolvent being indebted to the defendant in the sum of 30*l.* for fixtures on the same premises, and in the sum [*537 of 50*l.* for part of the consideration for the lease of the said house, executed a warrant of attorney, giving authority to enter up judgment at the suit of the defendant for the said respective sums of 30*l.* and 50*l.* Final judgment was signed thereon on the 30th of June, 1828, and a writ of *feri facias* upon the said judgment, at the suit of the defendant, was issued on the same day against the goods and chattels of the insolvent.

On the said 30th of June, 1828, there was one year's rent due from the insolvent to the defendant under the said lease, and the defendant gave notice of the same being so due to the sheriff's officer, to whom the writ of execution was delivered, and at the same time required him to retain the same out of the proceeds of the said execution to satisfy the defendant for the said rent.

On the 1st of July, 1828, the lease, goods and chattels of the insolvent were taken in execution under the said writ, and on the 18th day of the same month were sold under and by virtue of such execution, and produced 217*l.* 13*s.* 6*d.*

The sum of 180*l.* for the said rent due to the defendant was deducted from the said sum of 217*l.* 13*s.* 6*d.*, the proceeds of the said sale, and on the 7th of August paid over to the defendant by the said officer; and the balance, after further deducting the several sums due for taxing and incidental expenses, was paid into court in this action.

On the 14th of June, 1828, the insolvent surrendered himself to prison in discharge of his bail, and continued in prison from that time until his discharge thereafter mentioned.

On the 19th of July he filed his petition in the court for the relief of insolvent debtors in England under and *in pursuance of the act, passed in the seventh year of his present majesty's reign, intituled An Act to [*538 amend and consolidate the laws for the relief of insolvent debtors in England; and, on the 24th of September, 1828, the said insolvent was, under and in pursuance of the said act, discharged from imprisonment.

The plaintiffs were the assignees of the estate and effects of the said insolvent, and duly appointed and constituted according to the said act.

The jury found that the said warrant of attorney was not given by way of fraudulent preference to the defendant.

The question for the opinion of the Court was, whether the plaintiffs, as assignees of the insolvent, were entitled to recover from the defendant the said sum of 130*l.* so paid to the defendant?

If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict for the plaintiffs was to stand; if not, a nonsuit was to be entered.

Taddy, Serjt., for the plaintiffs. The defendant is not entitled to retain the amount of rent taken under the execution. The object of the insolvent debtors' act, like that of the bankrupt acts, is to effect an equal division of the debtor's property; and as far as respects the defendant's warrant of attorney, he was compelled to refund the proceeds of the execution to the creditors, under the thirty-four section of 7 G. 4, c. 57. In *Notley v. Buck*, 8 B. & C. 160, it was decided on the corresponding provision of the bankrupt act, 6 G. 4, c. 16, s. 108, that the creditors were entitled to recover from the sheriff in an action for money had and received the proceeds of an execution levied after the bankruptcy of the debtor upon a judgment by *nil dicit* suffered by him before. There is no *exception in favour of a landlord. And the statute 8 Ann. c. 14, *539] s. 1, by which it is enacted that "no goods or chattels shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the premises by virtue of such execution, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent, provided the said arrear do not amount to more than one year's rent," applies only to cases where an execution creditor claims adversely to the landlord, not where the landlord is himself the execution creditor. The object of that statute was to protect the landlord against the frauds of tenants, particularly in colluding with creditors to deprive the landlord of the means of distraining for his rent; and it would lead to serious inconvenience if a landlord were permitted to levy his rent under an execution for a debt of a different description; the tenant would be deprived of the right of contesting in a replevin the amount of rent claimed, and would be divested of the protection afforded him by the various acts for the prevention of irregular distresses. It is plain that the execution cannot be supported under the judgment, and the statute 7 G. 4, would be rendered nugatory if the defendant could effect that in the character of landlord which he is precluded from doing as a creditor. In *Lee v. Lopez*, 15 East, 231, the sheriff upon an execution by the landlord levied for him, as rent arrear, 140*l.* beyond the amount of the execution debt; but the tenant having previously committed an act of bankruptcy, it was held that his assignees were entitled to the money. That case cannot be distinguished from the present. And it has not been the practice of the courts to give a more ex- *540] tended *construction to the statute of Anne; for in *Brandling v. Bar- rington*, 6 B. & C. 467, where the sheriff had retained a sum for rent on executing on the tenant a writ of *pone per vadios*, which it was held he ought not to do, Lord Tenterden said, "The process under which the sheriff seized and sold the goods in question was not process of execution on a judgment; it was not therefore within the words of the statute. But it is said that it was within the equity. Speaking for myself alone, I cannot forbear observing, that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them."

Wilde, Serjt., *contra*. Under this execution the defendant is entitled to retain the sum due to him for rent; for the thirty-fourth section of 7 G. 4, c. 57, does not avoid the execution,—*Taylor v. Taylor*, 5 B. & C. 392,—resembling in that respect the 108th section of the bankrupt act, 6 G. 4, c. 16; and *Moreland v. Pellatt*, 8 B. & C. 722, comes nearer to the present case than *Notley v. Buck*. In *Moreland v. Pellatt*, judgment was entered up on a warrant of attorney given by two joint traders, and a *fi. fa.* issued, returnable on the 2d of May. On the 1st of that month the sheriffs' officer received from the defendants the money

directed to be levied. On the 2d of May one of them committed on act of bankruptcy, and the other on the 5th. On the 11th a commission of bankrupt issued, and on the 19th the sheriff paid over the money to the execution creditor. In an action by the assignees, it was held, that he was entitled to retain it, not being creditor having a security at the time of the *bankruptcy. The acts of the sheriff in the present case were legal; the money was levied and [*541] became the property of the defendant on the 18th; while the plaintiffs, as assignees, have no title till the 19th, the date of the assignment. In *Lee v. Lopez* the sheriff was a wrongdoer, having seized after an act of bankruptcy, which distinguishes that case from the present. But the defendant's claim as landlord is also protected by the statute of Anne. It is clear that, if he had gone through the formality of a distress just before the execution, he would have been entitled to the rent: and virtually he may be said to have done so: for under the statute of Anne the sheriff upon receiving notice of the rent due becomes the agent of the landlord, and is compelled to levy for the rent before he proceeds with the execution. No distress is actually made by the sheriff or the landlord; and one object of the statute was to avoid the conflict of two distinct claims to the same property in the custody of the law. And though as among traders the object of the law is an equal distribution of the debtor's property, yet it has never been intended to deprive the landlord of his priority; and the courts have summarily ordered the sheriff to pay over to him the money levied; *Gore v. Goston*, 1 Str. 643, *Darling v. Hill*, Cas. Temp. Hardw. 255. In *Henchet v. Kimpeen*, 2 Wils. 140, *Pratt, C. J.*, said, "The law gives this entry to the sheriff only by virtue of the execution, but after he has notice of rent being due to the landlord, he cannot remove the goods before he has satisfied the landlord one year's rent; the landlord shall have the like benefit of distress for one year's rent as if there had been no execution at all; unless the rent be paid, the sheriff must quit, and if he does not quit, a special action on the case lies against him after notice of the rent due; but there is a shorter way, by motion to the *Court, as in the present case, that the landlord may have restitution to the amount of the goods the sheriff has sold." And in *Collier v. Speer*, 2 [*542] B. & B. 67, the Court said, "The sheriff infringes the statute if, after notice of rent in arrear, he remove any of the goods without retaining that rent. The words of the statute are, 'No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent, &c. And the sheriff or other officer is thereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.' It is clear that the sheriff must first levy for the rent and then for the execution. It would be a great hardship on the landlord to oblige him to watch the sheriff's officer for the purpose of seeing when the execution is finished, and whether or not sufficient distress is left behind. The statute requires no such thing." Then, this being an action for money had and received, the plaintiff can only recover if he be entitled to the money in equity and good conscience; *Rastell v. Stratton*, 2 T. R. 366; and if the two parties are equally well entitled, *potior est conditio possidentis*. As there could have been no dispute if the defendant had gone through the formality of a distress, he ought not to be deprived of his due when the residue for the creditors has been increased rather than diminished by the omission of that formality, all the *expenses of which must have come out of the debtors' estate. The plaintiff's title [*543] could not accrue till the 19th, while the defendant was fairly in possession on the 18th, for the property in the goods is in the debtor till sale, and the money produced is at once the property of the creditor. In *Moore v. Pyrke*, 11 East, 54, Lord Ellenborough said, "Does the money produced by the sale vest in the

first instance in the landlord or in the tenant? On the best consideration I can give it, I think the money does not vest in the tenant, but is an instantaneous executed satisfaction of the rent vesting to that amount in the landlord, and that the tenant has only an interest in the surplus, if any." And in *Ex parte Plummer*, 1 Atk. 103, cases are mentioned which show how far the courts will go on that principle. In *Dixon v. Smith*, 1 Swanst. 457, it was adjudged, that under a sequestration, the landlord was entitled to be paid arrears of rent. And in *Buckley v. Taylor*, 2 T. R. 600, it was held, that if a trader after committing an act of bankruptcy, take a shop, and agree to pay half a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, and before the year expired, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent. The landlord, therefore, having in this case been fairly in possession of the money, and no better right having supervened, he is entitled to retain it.

Taddy. It is not in equity or good conscience, but by positive law, that a *544] landlord is preferred to other *creditors, and if he omit the procedure prescribed by positive law, he has no superior claim. The action for money had and received is the only action, after a sale, in which the question can be tried, and effect be given to the principle of the insolvent debtors' act: *Notley v. Buck*. Except where a distress has actually been levied, that act supersedes the statute of Anne, and the principle established in *Lee v. Lopes* will decide the present case, although the facts may be somewhat different. The cases in Chancery do not apply to the present question, because in those cases the money was in the hands of the Judge in equity, and Lord Tenterden distinguished them on that ground in *Brandling v. Barrington*.

TINDAL, C. J. The main question is, whether the right of the landlord to receive his rent in the mode he has here pursued, is protected by the statute of Anne. For, if his case be not within that statute, the rent, though apparently received under colour of law, has been received without authority, and has therefore been received to the use of the insolvent's assignees: and we are of opinion that the defendant's case does not fall within the operation of the statute of Anne.

That statute was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution; for property so in the custody of the law could not be distrained, and the judgment creditor, by keeping possession for a length of time, might seriously affect the interests of the landlord. The statute, therefore, contemplated executions issued by third persons, and not by the landlord. The language is, No goods upon any tenements leased shall be taken by any execution, unless the *party* at whose suit the execution is sued out shall, before *545] the removal of such goods by virtue of such execution, *pay to the landlord* of the *premises all such sums as shall be due for rent: Provided, &c.

This clearly contemplates an adverse execution; a *jus tertii*, against which it proposed to protect the landlord. A different construction would be most unfair to the tenant, for the sheriff is directed not to levy the execution till the rent has been obtained. See what would be the situation of the tenant. The landlord, upon suing out execution for a small debt, might claim rent beyond what was due, and the tenant would not only be deprived of his replevin, but of the benefit of those statutes which were passed to protect him against irregularities in distress, and a hasty and improper sale of his goods. Under an execution the sheriff might sell at once: the landlord would obtain a greater advantage than he is entitled to, and the tenant be placed under a greater disadvantage. It seems to us, therefore, that the landlord under the circumstances of this case is not protected by the statute of Anne, and that the money

sought to be recovered was had and received to the use of the insolvent's creditors.

PARK, J. I was impressed with the argument that the action for money had and received does not lie; that, however, would only be an argument, supposing the defendant's case to fall within the provisions of the statute of Anne. But I am clearly of opinion that it does not; for the statute supposes a writ *has* issued, when the landlord comes to claim his rent. It contemplates an adverse execution; and any other construction would be open to all the inconveniences which have been specified, by depriving the tenant of his replevin, and enabling the landlord to levy more rent than was due. The defendant, therefore, having obtained the money in question by his own unauthorized act, is liable to refund it in an action for money had and received.

*GASELEE, J. For the reasons which have been given, I think this case is not within the statute of Anne; therefore the money paid to the defendant in August was money had and received to the use of the assignees. [*546]

BOSANQUET, J. I am of the same opinion. The statute of Anne was passed in contemplation of cases where the landlord's rights might be defeated by the intervention of a third person. In that case the sheriff is directed to levy and pay as well the money so due for rent as the execution money. There being no adverse execution here, the landlord might have distrained before he set the sheriff in motion. It has been insisted, however, that he might levy under the execution as much as he was entitled to distrain for rent; but if he were permitted to do that, the tenant would be deprived of his replevin, and other inconveniences would ensue.

The rent, therefore, has been levied improperly; and, as it appears by what fell from Holroyd, J., in *Notley v. Buck*, the action for money had and received is the proper remedy for the parties entitled. Judgment for the plaintiffs.

*MORLEY v. FREAR. *May 14.*

[*547]

A covenant not to sue upon a bond during the life of the obligor, and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor during his life interest on the amount recovered: Held, no bar to an action by an assignee of the bond in the name of the obligee.

DEBT on bond for 2000*l.* conditioned for the payment of 1000*l.*

Plea,

That after the making of the said writing obligatory, to wit, on the 14th day of November, 1828, to wit, at, &c., by a certain deed poll or writing of release, sealed with the seal of the plaintiff, which said deed poll the said defendant now brings into Court here, the date whereof is the same day and year last aforesaid; after reciting that under and by virtue of a certain deed of settlement, or other instrument, made upon the marriage of Isabella Morley, the then wife of the plaintiff, with one William Holgate, gentleman, deceased, her former husband, and under and by virtue of the last will and testament of the said W. Holgate, the plaintiff, was or would become entitled (in right of the said Isabella his wife, on the decease of her father, the defendant), to the principal sum of 750*l.*, being one moiety or half part of the sum of 1500*l.*, which, by such deed of settlement, or other instrument as aforesaid, the said defendant had covenanted or otherwise bound himself that his heirs, executors, or administrators, should pay after his decease unto the said W. Holgate, his executors, administrators, or assigns; and which, under and by virtue of the said will of him the said W. Holgate, would become divisible between the said Isabella Morley and her son William Frear Holgate, in equal moieties or proportions; and after further reciting that the defendant, in and by a certain bond or obligation bearing even date therewith, being the same writing obligatory as in the said *declaration was [*548]

mentioned, became bound unto the said plaintiff, his executors, administrators, and assigns, in the penal sum of 2000*l.*, conditioned for the payment of the sum of 1000*l.* with statute interest for the same as therein mentioned; and that it had been agreed that, in consideration thereof, the plaintiff and Isabella his wife should release unto the defendant, his heirs, executors, administrators, and assigns, all their interest, title, claim, and demand whatsoever, in and to the said sum of 750*l.* and that the plaintiff should not receive interest for the said sum of 1000*l.* during the life of the said defendant, notwithstanding the said bond; and, further, that if the said bond should happen to be assigned by the plaintiff, and the defendant should be obliged to pay the interest thereof, the plaintiff should repay or make good the same; it was by the said deed poll witnessed, that, in pursuance of the said agreement, and in consideration of the premises, and of the sum of 10*s.* of lawful British money to the plaintiff and Isabella his wife, then paid by the defendant, the receipt whereof was thereby acknowledged, the plaintiff had remised, released, and for ever quitted claim, and, by the said deed poll or writing, did for himself, his heirs, executors, administrators, and assigns, remise, release, and for ever quit claim unto the defendant, his heirs, executors, administrators, or assigns, and did fully and absolutely exonerate and discharge him, them, and every of them, of, from, and against all that the said sum of 750*l.* being the said Isabella Morley's moiety, share, or proportion of the said sum of 1500*l.* as aforesaid, and all the estate, right, title, interest, property, benefit, claim, and demand whatsoever, of them the plaintiff and Isabella his wife, and each of them, of, in, to, or out of the said sum of 750*l.* or the said sum of 1500*l.* and every or any part thereof respectively; and also all that the covenant, promise, agreement, and obligation

*549] in the said deed of settlement, *or such other instrument as aforesaid, contained or expressed for payment of the said sum of 1500*l.*, and all benefit and advantage to be had or taken of, from, or by means of the said deed or instrument, or of any covenant, claim, matter, or thing therein contained, and also of, from, and against all and all manner of action and actions, suit and suits, cause and causes of action and suit, liabilities, sum and sums of money, claims and demands whatsoever, which the plaintiff and Isabella his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, could or might have, claim, or demand, or if the said deed poll or writing had not been made, could or might have had, claimed, demanded or been entitled, in, to, upon, from, or against the defendant, his heirs, executors, administrators, or assigns, in his, their, or any of their lands, tenements, goods, chattels, or effects, for or in respect of the said sums of 750*l.* and 1500*l.* or either of them, or by reason or on account of the said deed or other instrument, or of the breach or non-performance thereof, or otherwise howsoever in relation thereto, so and in such manner as that they the plaintiff and Isabella his wife, their and each of their heirs, executors, administrators, or assigns, and all other persons claiming or to claim from, through, under, or in trust for them, any or either of them should not, or could nor might take, have, or receive any advantage, or otherwise avail himself or themselves of the same in any manner howsoever; and the plaintiff did thereby for himself, his heirs, executors, and administrators, amongst other things, covenant, declare, and agree with and to the defendant, his heirs, executors, administrators, and assigns, that the plaintiff, his heirs, executors, or administrators, should not require payment of the said sum of 1000*l.*, nor claim or demand any interest for the same during the life

*550] of the said defendant; and that in case the said bond should be *assigned by him the plaintiff to any person or persons who should claim or demand, and receive of and from the said defendant interest for the said sum of 1000*l.* he, the plaintiff, his heirs, executors, or administrators, should and would repay unto the said defendant all such sum and sums of money as he should so pay for such interest; and in case he the defendant should be required by any assignee or assignees of the said bond to pay the said principal sum of 1000*l.* then that he the said plaintiff, his heirs, executors, or administrators, should and

would pay unto the defendant statute interest for the same during the term of his natural life, as by the said deed poll, reference being thereunto had, will, amongst other things, more fully appear; and this he the said defendant is ready to verify; wherefore, &c.

Replication,

That after the making of the said writing obligatory in the said declaration mentioned, and after the making of the said deed poll or writing of release in the said plea mentioned, and before the commencement of this suit, to wit, on the 7th day of November, 1829, to wit, at, &c., by a certain indenture then and there made between the said plaintiff of the one part, and one Henry Fitzwilliam Baker of the other part; one part of which said indenture, sealed with the seal of the said plaintiff, the said plaintiff brings into Court here, the date whereof is a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid; after reciting, as therein is particularly recited, in consideration of the sum of 1000*l.* of lawful British money before the execution of the said indenture, lent and advanced to the plaintiff, by the said H. F. Baker, and then due and owing to him the said H. F. Baker, the receipt whereof the plaintiff did by the said indenture acknowledge; and also in consideration of the sum of 10*s.* of like lawful money to the plaintiff *then paid by the said H. F. Baker, the receipt whereof was thereby acknowledged, he the plaintiff [*551] did bargain, sell, assign, transfer, and set over unto the said H. F. Baker, his executors, administrators, and assigns, the said writing obligatory in the said declaration mentioned; and also the penal sum, and all benefit and advantage whatsoever to be had or derived therefrom, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the plaintiff in, to, or concerning the same, to have and to hold the said writing obligatory, penal sum, and other the premises, by the said indenture assigned or intended so to be, unto the said H. F. Baker, his executors, administrators, and assigns, to and for his and their own proper use and benefit; and for the better and more effectually enabling the said H. F. Baker, his executors, administrators, and assigns, to enforce the payment of, and to receive the moneys due or to become due upon the said writing obligatory, he the plaintiff did, by the said indenture, make, depute, constitute, and appoint the said H. F. Baker, his executors, administrators, and assigns, his true and lawful attorney and attorneys irrevocable for him the plaintiff, and in his name and in the name or names of his executors or administrators, but for the sole and proper use and benefit of the said H. F. Baker, his executors, administrators, and assigns, to demand, sue for, recover, and receive of and from the defendant and all and every other the person and persons to whom it should and might belong to pay the same, all and every the sum and sums of money then or at any time, and from time to time thereafter to grow, or become due, or be payable upon or by virtue of the said writing obligatory, and on non-payment thereof, to use and take all such lawful and equitable ways and means for obtaining or recovering the same as should be deemed necessary or expedient in that behalf, and on payment thereof to *deliver up or cancel the said writing obligatory, and to give [*552] sufficient releases and discharges for the moneys due thereon, and one or more attorney or attorneys under him the said H. F. Baker, his executors, administrators, or assigns, for any of the purposes aforesaid to nominate, substitute, or appoint, and from time to time to remove and displace as he or they should think fit, he the plaintiff thereby transferring and giving unto the said H. F. Baker, his executors, administrators, and assigns, his full power and authority in the premises, to every intent and purpose, and ratifying and confirming, and promising and agreeing to ratify and confirm all and whatsoever he or they should lawfully do or cause to be done in or about the premises by virtue of the said indenture, as by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear; and the said plaintiff further said, that the writ in this suit was sued out, and that this action was brought and is prosecuted against the said defendant in the name of him the said plaintiff for and on the behalf of the

said H. F. Baker, for the purpose of enabling him the said H. F. Baker to receive the said debt in the said writing obligatory mentioned, according to the form and effect, true intent and meaning, of the indenture, and solely for the use, benefit, and advantage of the said H. F. Baker as assignee of the said writing obligatory in the said declaration mentioned, and not for the benefit, advantage, use, or behoof of the said plaintiff, to wit, at, &c., and that the said plaintiff was ready to verify; wherefore he prayed, &c., demurrer and joinder.

Cross, Serjt., in support of the demurrer. The defendant's bond and the plaintiff's deed poll being reciprocal and simultaneous, the deed poll is a defeasance of the bond, and may be considered in the same light as *a condition, for a defeasance operates as a condition. *Com. Dig. Defeasance.* The bond, therefore, was given upon condition that it should not be put in suit till after the death of the obligor, and this action is premature. In *Clayton v. Kynaston*, 2 Salk. 574, K. covenanted to pay 100*l.* at the death of W. W.'s executor sued K., who pleaded another deed at the same time, whereby W. covenanted to indemnify K. from all agreements, &c., made before and after. *Per Curiam.* "If A. be bound to B., and then B., reciting the bond, covenants to save him harmless, this is an absolute defeasance; and if it be to save him harmless on a contingency, it is a conditional defeasance, *because it hath an express relation to the deed.*" And in *Burgh v. Preston*, 8 T. R. 488, upon a bond conditioned that A. should indemnify B. from all sums B. should pay on A.'s account, and before execution of the bond: memorandum endorsed, that B. hath given an undertaking not to sue upon the bond until *after* A.'s death: it was held, that the memorandum was part of the condition, and made the bond, in effect, payable by A.'s representatives.

Then, if the obligee is precluded from recovering, his assignee can stand in no better condition; for the assignee cannot take a larger right than the party assigning. And though it may be said, that the provision as to assignment would have been nugatory if the assignee were precluded from suing, the paramount intention must prevail, and the assignee, like the obligee, must postpone his action till the death of the obligor. The provision for paying the obligor interest, in case of an assignee's recovering against him, was inserted to meet a merely possibly recovery, as if the obligor should have lost and been unable to avail himself of the deed poll.

Wilde, contrâ, was stopped by the Court.

*554] *TINDAL, C. J.* The question is, whether the deed poll set out on these pleadings operates as a defeasance of the bond which the plaintiff has declared on, or as a release of the action; for, unless such be the case, the plaintiff is entitled to judgment.

The plaintiff has declared on a bond conditioned for the payment of 1000*l.* The defendant, in answer to this claim, sets up a deed, by which, after reciting that the plaintiff had held a bond for 750*l.*, payable by the defendant's executor, and that the defendant had substituted for it a bond for 1000*l.*, the plaintiff releases the bond for 750*l.*; covenants not to sue on the bond for 1000*l.* in the lifetime of the defendant; and that if any other should sue in his name and recover, the plaintiff would pay the defendant, during his life, interest on the sum recovered.

It is impossible to overlook the distinction between two parts of this deed poll. The one, consisting of a release of a bond for 750*l.*, payable after the death of the obligor; the other, a covenant not to sue on the substituted bond. There are, no doubt, many cases in which a covenant not to sue may, if such be the intention of the parties, operate as a release. In *Lacy v. Kynaston*, 1 *Ld. Raym.* 690, it was urged that a perpetual covenant never to take advantage of a covenant, &c., is a release. The Court "agreed it, for avoiding circuity of action; as, if A. be bound to B. in a bond, &c., B. covenants never to sue A. upon this bond, this will be a bar in debt brought on the bond, because B. has bound himself against all the remedy that he might have upon the bond. But, if B. and A. be jointly and severally bound to C., C. covenants never to sue A.,

this is no defeasance, because he has a remedy against B., but A. will have only covenant," &c.

*We must, therefore, ascertain whether it was the intention of the parties here that this deed poll should operate as the one or the other. It does [*555 operate as a release of the claim for 750*l.*, being the marriage portion of the obligee's wife; but as to the bond given in lieu, it contains merely a covenant that the obligee shall not demand payment or claim interest till after the death of the obligor; and that if the principal should be recovered by any assignee of the bond, the plaintiff would pay the defendant, during his life, interest on the amount recovered. The covenant, therefore, is only that the obligee will not demand payment; but by specifying what should be done in case of an assignment, the parties show that the possibility of such an event was obviously contemplated. The intention seems to have been to place the obligee himself in the same situation, with respect to the substituted bond, as he would have been in with respect to the old one. If the defendant had reason to think that the action was brought to enable the plaintiff to recover for himself, and not on a *bond fide* assignment, he might have pleaded the fraud.

PARK, J., concurred.

GASELEE, J. The intention of the clause respecting an assignment, seems to have been to enable the plaintiff, in case of need, to raise money on the credit of the bond.

BOBANQUET, J., concurred in giving

Judgment for the plaintiff.

Cross requested permission to rejoin fraud, but the Court refused.

*MOSER and Another, Assignees, &c. v. NEWMAN and BOOLE. [*556
May 14.

Under 6 G. 4, c. 16, s. 5, an act of bankruptcy, by lying in prison twenty-one days, does not relate to the first day of imprisonment.

THIS was an action of trover. Plea, general issue.

At the trial of the cause before Tindal, C. J., London sittings after Trinity term last, a verdict was found for the plaintiffs for the sum of 512*l.* 18*s.* 1*d.*, the damages agreed upon between the parties, subject to the opinion of the Court on the following case:—

The plaintiffs were the assignees of the estate and effects of R. H. Marshall, bankrupt, the assignment to them having been duly executed on the 29th of February, 1828.

The first-named defendant had been the sheriff of the county of Devon, and the last-named, Thomas Boole, was an execution creditor of the bankrupt, under whose indemnity the sheriff acted in the several matters therein stated.

On the 12th of September, 1827, the bankrupt executed a warrant of attorney to the defendant, T. Boole, for securing the payment of the sum of 500*l.*, then advanced to the bankrupt.

That warrant of attorney was duly filed, and judgment was entered up by *nil dictu* on the 16th of January, 1828, on which day a writ of *fiert facias* was issued, directed to the sheriff of Devon, endorsed to levy 512*l.* 18*s.* 1*d.*, returnable on Wednesday the 28d of January then next following.

On Friday the 18th of January the writ was delivered to the sheriff, who thereupon seized the goods under the writ, which before the bankruptcy belonged to the bankrupt, and which then remained in his *possession. The [*557 sheriff afterwards, on the 22d January, commenced selling the goods so seized, and continued such sale up to and on the 25th day of the same month, when the last of such goods were sold. The proceeds of the sale remained in the hands of the sheriff until the 28th day of August following, when they were paid over to the defendant, Thomas Boole.

The bankrupt was detained in prison, in the custody of defendant, Newman, as sheriff of Devon, for debt upon *meane process*, on and from the 23d day of January, 1828, for twenty-one days and upwards then next following. On the 14th day of February, 1828, a commission of bankrupt was duly issued against the said R. H. Marshall; and on the 18th of February notice was given to the sheriff that such commission had issued against the bankrupt, and that all his goods, money, and effects, seized by the sheriff, and then in his hands, were claimed under the said commission.

The questions for the opinion of the Court were, first,

Whether, under the fifth section of 6 G. 4, c. 16, the act of bankruptcy, by lying in prison twenty-one days, had relation to the first day of such imprisonment.

Secondly, whether, supposing such relation to have existed, an action of trover was maintainable, in respect of goods seized by the sheriff under the *fiery facias*, on a day prior to the first imprisonment.

Thirdly, whether the sale, before the act of bankruptcy was complete, amounted to a conversion; and,

Fourthly, whether the plaintiffs were entitled to recover the value of the goods so seized and sold by the sheriff.

If the Court should be of opinion that the plaintiffs were entitled to the verdict, it was agreed upon by the parties that the same should be entered for the sum of 512*l.* 18*s.* 1*d.* and costs.

The decision of the Court turned on the first point only.

*558] *Wilde*, Serjt., for the plaintiffs. The act of bankruptcy has relation to the first day of the imprisonment.

By 6 G. 4, c. 16, s. 5, it is enacted, "That if any trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: Provided, that if any such trader shall be in prison at the time of the commencement of this act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months."

The statutes 21 Jac. 1, c. 19, s. 2, and 5 G. 2, c. 80, make the nonpayment of a debt of 100*l.* within six months after the debtor shall have been arrested for the same, and the lying in prison two months upon an arrest, or escaping thence, an act of bankruptcy from the day of the arrest. The stat. 1 Jac. 1, c. 15, s. 2, makes the lying in prison six months an act of bankruptcy, without any words giving it a relation to the first day of the arrest. No decisions have been reported on the subject of such relation, prior to 21 Jac. 1; but considering the preambles in the early bankrupt acts, and the severity with which bankrupts were viewed, it is probable the same construction would have been given to the sta-

*559] tute 1 Jac. 1 as to 21 Jac. 1. *otherwise opportunity would have been given to the bankrupt to make way with all his effects during his six months' imprisonment. The decisions on 21 Jac. 1 have been conflicting: In *Duncombe v. Walter*, 2 Show. 253, the Court determined, with respect to a non-payment of debt within six months after arrest, that the words of relation applied to the commencement of actual imprisonment, and that the act of bankruptcy took place only from the surrender to prison. But in *Hill v. Shish*, 2 Show. 594, the preceding case is supposed to have been decided on the ground that the arrest was unauthorized; and it was holden upon a similar case that the act of bankruptcy dated from the arrest. *Holt*, C. J., also, in *Smith v. Stracy*, 1 Salk

110, held the words of the relation to apply to the first arrest. However, though the decisions on that point have varied, it will be expedient to construe an act of bankruptcy, constituted by lying in prison twenty-one days, as taking place from the first day of the imprisonment, lest the bankrupt should make away with his effects during the twenty-one days. By section 135, the act is, in cases of doubt, to be construed beneficially to creditors. In *Higgins v. M'Adam*, 3 Young & Jar. 1, the point has been decided against the relation to the first day of the imprisonment; but the intention of the legislature may still admit of doubt.

TINDAL, C. J. I am of opinion that the act of bankruptcy is not complete till the twenty-one days have elapsed, and I should be of that opinion even if the matter were *res integra*. The act says, "That if any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment *for debt or nonpayment of money, or upon any detention for debt, lie in prison for twenty-one days, or having been arrested or committed to prison for any other cause, shall lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy." [560]

The word *thereby* is a comprehensive word, and means by the twenty-one days during which he has been in prison. And the next clause shows the distinction, "Or if any such trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention."

The meaning of which clearly is, that in the one case the act of bankruptcy shall be reckoned from the end of the twenty-one days, in the other, from the first arrest. And the distinction may be said to appear historically; for the clause of relation is omitted in the first statute, 1 Jac. 1, c. 15, inserted in the next, 21 Jac. 1, c. 19, and continued ever since till the passing of the 5 G. 4, and 6 G. 4, c. 16, when it appears to have been omitted by design, the period of confinement constituting an act of bankruptcy having been materially abridged. The case of *Hill v. Shish* is open to much doubt, having been decided, according to the report, without due consideration: *Smith v. Stracy* contains only an opinion thrown out at *Nisi Prius*. Besides, looking at the statute of 21 James 1, a distinction may be drawn between an act of bankruptcy, by not paying a debt within six months after an arrest, and an act, by lying in prison two months, or escaping from prison after the arrest. For it is only in the case of lying in the prison for the two months, or escaping, that the relation to the time of the arrest is, by the express language of the statute, to take place.

*PARK, J. I am of the same opinion, and think the question is historically clear; for when we observe the legislature sometimes inserting [561] and sometimes omitting the clause of relation, we must presume their attention has been drawn to the point, and that the last omission, at least, is designed, especially when we see the preceding act, 5 G. 4, c. 98, s. 4, leaves out the clause of relation in every case. The case of *Higgins v. M'Adam*, which appears to have been well considered, leaves no doubt on the point.

BOSANQUET, J. I am of the same opinion. The courts are cautious in giving to any act a retrospective effect by relation; and seeing that this clause has been omitted after previous insertions, we must consider the omission designed, especially when a shorter period of imprisonment is constituted an act of bankruptcy.

GASELEE, J., was at chambers, but concurred in the decision of the Court.
Judgment of nonsuit.

DOE dem. Lord TEYNHAM v. TYLER. May 21.

The Court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury.

THE question raised in this ejectment was, whether Henry, the twelfth Lord Teynham, was of sound mind when he suffered a recovery in 1789. There was conflicting evidence on the point; but, in the opinion of the Court and jury, *562] the evidence in favour of his *lordship's being of sound mind preponderated, and on that ground a verdict was found for the defendant.

A great number of witnesses spoke to his lordship's competency to transact all ordinary business; and, among other evidence to this effect, the accounts of a deceased steward were put in, which it was assumed his lordship had examined and settled.

These accounts were handed to the jury, and commented on by the counsel for the defendant as being important to his case.

The accounts, however, purporting to discharge the steward as well as to charge him,

Jones, Serjt., obtained a rule nisi for a new trial, on the ground, among other objections (see ante, 890), that those accounts had been improperly received in evidence, inasmuch as on the whole they tended to discharge the steward; and the only ground on which such documents could be received in evidence, was, as charging the deceased person, and so being against his interest. *Warren v. Greenville*, 2 Str. 1129; *Goodtitle v. Chandos*, 2 Burr. 1065; *Higham v. Ridgway*, 10 East, 109; *Outram v. Morewood*, 5 T. R. 121; *Roe dem. Brune v. Rawlings*, 7 East, 279; *Calvert v. Archbishop of Canterbury*, 2 Esp. 646; *Barry v. Bebbington*, 4 T. R. 514.

The Court, upon hearing the report of the trial read, stopped *Wilde*, Serjt., who was to have shown cause, and called on

Jones, to show that there was not enough to sustain the verdict, independently of the evidence objected to.

He contended, that it was impossible for the Court to discriminate between *563] the effects produced by each parcel *of evidence on the mind of the jury, or to determine that the verdict was not altogether occasioned by the very lot of evidence now objected to; and that a new trial ought to be granted, if that evidence were clearly inadmissible.

TINDAL, C. J. This rule must be discharged. I will assume for the purpose of this discussion, though I give no opinion on the point, as we have not heard the other side, that the evidence in question, ought not to have been received. But the Court will not close their eyes to the rest of the evidence; and if they see that there is enough, not merely to make the scales hang even, but greatly to preponderate in favour of the defendant, they will not send the cause to a jury again. It has been contended, that we are to analyze the evidence by a difficult process, and to discriminate the precise effect produced on the mind of the jury on each portion of the proof: but we have a much plainer course; and that is, to hear the report of the trial, and to sustain the verdict, if we are satisfied that there is enough to warrant the finding of the jury independently of the evidence objected to. On this principle, the decisions in *Horford v. Wilson*, 1 Taunt. 12, and *Nathan v. Buckley*, 2 B. Moore, 158, are quite in point; and we cannot send the cause to a new trial when the jury are right upon that portion of the evidence which is unimpeached.

PARK, J. I am of the same opinion. I will assume, for the purpose of this argument, that the evidence in question ought not to have been admitted; but when we look at the rest of the evidence in the cause, its reception does not offer the slightest ground of objection to the verdict. It has been repeatedly *564] ruled, that though *particular portions of evidence are objected to, if the rest be sufficient to warrant the conclusion to which the jury have

come, the Court will not interpose. In *Horford v. Wilson*, Mansfield, C. J., said, "The Court will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury;" and the counsel for the defendant never objected. The same rule was acted on in the King's Bench, in *Edwards v. Evans*, 3 East, 451: and then, in *Nathan v. Buckley*. This is no new point, and we are not exceeding the line of our duty in determining whether or not the verdict is warranted by that portion of the evidence which is not objected to.

GASELER, J. The evidence objected to was intended to show only one of various acts, which all tended to show that the party, whose competency was in question, possessed sufficient faculties to transact the ordinary business of life. Its reception, therefore, could not have had any material influence on the jury; and, as the lessor of the plaintiff is not precluded from commencing another ejectment, I concur in thinking that this rule ought to be discharged.

BOSANQUET, J. The granting a new trial is a matter of discretion in the Court; a discretion indeed, not to be exercised capriciously, but according to the rules and practice of the Court: and I think we may, according to those rules, refuse a new trial in this case; there being evidence amply sufficient to support the verdict, exclusively of the evidence objected to. Rule discharged.

***NEWELL v. SIMPKIN and Others. May 21.**

[*565]

In a suit touching the validity of a parish rate, the plaintiff is entitled to inspect the parish books without paying any costs.

THIS was an action against the churchwardens of a parish to try the validity of a rate.

Wilde, Serjt., having obtained a rule nisi for the defendants to permit the plaintiff to inspect and copy the parish books,

Merewether, Serjt., on the part of the defendants, offered to comply, if the plaintiff would pay the costs of the person attending to exhibit the books in question; but

Wilde insisted on the inspection as a matter of right.

The Court desired that a similar rule in the Court of King's Bench in the *St. Martin's in the Fields* case should be inspected, for the purpose of ascertaining whether costs had been allowed. It appearing they had not, the present rule was made absolute, without any order as to costs.

***BEAVAN v. DAWSON, Sheriff of BEDFORD. May 31.**

[*566]

The sheriff, without previously requiring an indemnity, seized, under an execution issued by A. against L., goods which were in the possession of plaintiff under a bill of sale from L., notwithstanding notice of the bill of sale. He then applied to A. and plaintiff severally for an indemnity before proceeding further, but both refused, and the plaintiff sued him in trespass for the seizure.

The Court stayed the proceedings till an indemnity should have been given.

COLONEL LAUTOUR, upon adequate consideration of money advanced, made to the plaintiff in November, 1839, a bill of sale of his goods, with a condition that the sale should not take place later than the 1st of February.

The plaintiff immediately took and kept the goods, and on the 1st of Febru-

ary, at Lautour's request, and in expectation of payment, further postponed the time of sale till the 1st of March.

On the 22d of April, the goods, still in the possession of the plaintiff's bailiff, were, notwithstanding notice of the bill of sale, seized by the defendant as sheriff of Bedford, under a *fi. fa.* issued by Messrs. Antrobus, who had obtained a judgment against Lautour. Antrobus's attorney wrote to the under-sheriff, and, apprising him of the bill of sale which Lautour had made to the plaintiff, instructed him, nevertheless, to make a seizure of the goods, in order to obtain a priority and prevent a sale by the plaintiff; but not to sell immediately, as the attorney was desirous not to depreciate the property, by pressing it precipitately into the market.

The sheriff, after he had made the seizure, applied to Antrobus's attorney for an indemnity before proceeding further; but the indemnity being refused, he offered, if the plaintiff Beavan would indemnify him, to return *nulla bona*, and relinquish the possession of the goods.

The plaintiff, however, refused, and commenced this action of trespass against the sheriff; whereupon,

*567] *Wilde*, Serjt., on the authority of *Butts v. Smith*, referred to in *Probinia v. Roberts*, 1 Chit. 577, obtained a rule *nisi* to stay proceedings till the sheriff should have been indemnified.

Taddy, Serjt., showed cause. The Court will not extend to the sheriff the indulgence required, under circumstances such as the present. In cases where the sheriff is placed under difficulties by operation of law, as where property passes by relation, he is entitled to and receives relief. Upon an extent at the suit of the Crown or an execution against one who has committed an act of bankruptcy, it is often impossible for the sheriff to ascertain in whom the property is vested: but here the plaintiff was fairly in possession; and the sheriff, knowing that, lends himself to the plans of the execution creditor to prevent a sale by the plaintiff, without requiring an indemnity till he has actually made a seizure. He has no right to call on the plaintiff for an indemnity, after proceeding to act for the execution creditor without requiring one. *Probinia v. Roberts*, *Butts v. Smith*, and *King v. Bridges*, 7 Taunt. 294, are all cases of bankruptcy, in which the sheriff was placed in difficulties by the doctrine of relation. And in *Probinia v. Roberts* he had actually seized and was entitled to poundage before his possession was disputed. No case has gone so far as the present; and the application is not made upon payment of costs, which was enjoined in *Probinia v. Roberts*.

TINDAL, C. J. This case falls within the general principle, that the sheriff is not, at his own expense, to fight the cause of the contending parties. The proceedings must be staid till an indemnity has been given, and without payment of the plaintiff's costs, because the plaintiff has refused to indemnify when requested.

Rule absolute.

*568]

*NELSON v. WILSON. May 21.

Where the parties settle a cause without the intervention of the plaintiff's attorney, he cannot proceed to trial for his costs, unless he can clearly establish collusion between the parties to deprive him of his costs.

In this case the plaintiff, without communication with his attorney, received from the defendant, before the time for trial, a sum of money in satisfaction of the debt and costs sought to be recovered. Whereupon the plaintiff's attorney carried the record to the assizes, and took a verdict with 1s. damages, in order to issue thereon an execution for his costs.

Previously to the assizes, the defendant's attorney informed the plaintiff's attorney that the cause had been settled, and that if he proceeded to the assizes an application would be made to this Court to set aside the verdict.

It appeared in evidence at the assizes, and afterwards on affidavit, that there was ground for believing that the plaintiff and defendant had colluded together to deprive the plaintiff's attorney of his costs.

Wilde, Serjt., within the first four days of term, obtained a rule *nisi* to set aside the verdict, and for the plaintiff's attorney to pay the costs of the application, on the ground that he ought not to have proceeded to trial after the cause had been settled.

E. Lawes, showed cause, and contended, that the attorney was entitled to proceed for his costs, where there was, as here, a strong suspicion of collusion between the parties.

In reply, it was insisted that the attorney was not entitled to proceed, unless he could show a clear case of collusion.

*The Court having taken time to look into the affidavits,

[*569]

TINDAL, C. J., now said, It is undoubtedly competent for the party to settle the cause without the intervention of his attorney; and if the attorney proceeds in order to secure his costs, he is bound to make out a clear case of collusion between the plaintiff and defendant to deprive him of such costs. Upon reading the affidavits in this case, we think that, though there is ground for suspicion, the collusion has not been clearly made out, and that the proceedings must be stayed; but, under the circumstances, without costs.

Rule Absolute.

HUMPHREYS v. KNIGHT. May 13.

Where the defendant obtained his certificate as a bankrupt after issue, and before judgment, the Court refused, after judgment, to enter an *exoneretur* on the bail-piece.

THE defendant, a bankrupt, being sued on a debt contracted before his commission was issued, obtained his certificate under the commission after issue, and before trial: he did not plead his certificate *puis darrein continuance*, but the plaintiff's attorney had notice of the certificate before trial, and said he supposed proceedings were at an end. Having proceeded, however, to trial, and judgment,

Adams, Serjt., on behalf of the bail, who were in a condition to render the defendant if they thought fit, obtained a rule *nisi* to enter an *exoneretur* on the bail-piece, under the provisions of the 6 G. 4, c. 16, s. 121, by which it is enacted, "That every bankrupt who shall have duly surrendered, and in all things *conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed." And by s. 126, "That any bankrupt, who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand hereby made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution, or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any Judge of the Court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer, who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee, and such officer shall be hereby indemnified for so doing."

[*570]

Wilde, Serjt., showed cause. The 126th section only entitles the bankrupt to his discharge where he is arrested, after obtaining his certificate, on a debt due before the bankruptcy, and where he is taken, after certificate, under a judgment obtained before. The defendant is in neither of these predicaments, and *571] ought at *least to plead his certificate. In *Clarke v. Hoppe*, 3 Taunt. 46, it was held, that if an action be commenced, and the defendant become bankrupt and obtain his certificate, and afterwards permit judgment to be signed for want of a plea, after which the plaintiffs proceed against the bail, the Court will not relieve the bail on motion.

Adams. The practice has always been, to enter an *exoneretur* in these cases; *Joseph v. Orme*, 2 N. R. 180. And *Clarke v. Hoppe* was anterior to the 49 G. 3, c. 121. In *Woolcot v. Leicester*, 6 Taunt. 75, there was a surmise, that the certificate had been unfairly obtained: but in *Harmer v. Hagger*, 1 B. A. 332, the Court relieved the bail on motion, and refused to question the validity of the commission. Here, under the 121st section of the 6 G. 4, c. 16, the defendant is entitled to his discharge from the debt sought to be recovered in this cause. But if the bail remain liable, the defendant is liable; which is contrary to the intention of the legislature.

TINDAL, C. J. The bail no doubt stand in the same situation as the bankrupt; and if they had been damnified by anything that has taken place, so as to have been prevented from rendering their principal, we must have considered the question which has been raised on this rule. But here they are in a condition to render; and no question has been brought before us but the very important one, Whether the bankrupt is entitled to be discharged under the 126th and 121st sections of the statute.

If it be intended to obtain a decision on that question, we think the bankrupt should make the application for himself, and that this rule should be

Discharged.

*572]

*SAME CASE. May 21.

A bankrupt who obtained his certificate after issue, and before judgment, having after judgment, been rendered in discharge of his bail, was held entitled to be liberated on a summary application, although he had not pleaded his certificate *pais darrein continuance*.

THE defendant having now been rendered to prison in discharge of his bail,

Adams, Serjt., obtained a rule *nisi* for his discharge, pursuant to 6 G. 4, c. 16, ss. 121 and 126.

Wilde, Serjt., who showed cause, contended that the defendant ought to have pleaded his certificate *pais darrein continuance*, and could not be discharged on a summary application. His remedy was by *audita querela*.

The act having specified a case in which the bankrupt is to be discharged summarily, it may be inferred that in cases not specified he must be put to his plea. Section 126 gives the discharge on summary application, where the judgment has been obtained *before* the allowance of the certificate. Here it was not obtained till after; and the 121st section only discharges the bankrupt, subject to the provisions of section 126.

Adams. Although the certificate be obtained before judgment, the bankrupt is entitled to his summary discharge as much as if it had been obtained after; *Bouteffour v. Coats*, Cowp. 25; otherwise he might remain in prison for ever, if he neglects to plead *pais darrein continuance*. The object of the 126th section is to free the bankrupt from arrest and detentions of all kind after he has obtained his certificate; and from the Court's having required, in *Clark v. Hoppe*, a surrender before the bankrupt's application for his discharge, it must *573] be *inferred that the application after surrender is almost of course. In *Todd v. Maxfield*, 3 B. & C. 222, where a defendant obtained a certificate

under a commission of bankruptcy before trial, and did not plead it *puis darrein continuance*, the Court relieved the bail on motion.

TINDAL, C. J. The Court will decide on the principle to be drawn from s. 121. The preceding part of the statute having taken from the bankrupt all his property, the 121st section enacts, "That every bankrupt, who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter directed; but no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or who was then jointly bound or had made any joint contract with such bankrupt."

The provision of this section acts as a complete discharge from the time the certificate is granted. Here he had no doubt an opportunity of pleading his certificate *puis darrein continuance*; but as he might have obtained relief on *audita querela*, the Court may interpose summarily. Rule absolute.

*ROE dem. DURANT v. DOE. May 21.

[*574]

1. Where the lessor of the plaintiff, upon affidavit that a tenancy under a written instrument has been duly determined, moves that the defendant may give security for costs, a subsequent retaking, if an answer to the motion, must be alleged with particularity and precision.
2. A notice on the 28th of September, to quit on the ensuing 25th of March, is a sufficient half-year's notice to quit.

UPON affidavits which stated that the premises sought to be recovered in this ejectment had, in 1824, been demised by a written agreement to Thomas Moore, the tenant in possession; that the agreement had been duly executed, and was produced to the Court; that Moore's interest had been duly determined by a regular notice to quit; that demand of possession had been made; and that Moore had been served with a declaration in ejectment on the 24th of April, 1830,

A rule *nisi* was obtained under 1 G. 4, c. 87, calling on Moore, upon being admitted defendant, besides entering into the common rule and giving the common undertaking, to undertake, in case a verdict should pass for the plaintiff, to give the plaintiff a judgment to be entered up against the real defendant of the term next preceding the time of trial; and also to enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which should be recovered by the plaintiff in the action.

Cross, Serjt., showed cause, on an affidavit by Moore that he had held the premises for several years; that on the 28th of September, 1828, he received notice to quit on the 25th of March, 1829; that long after the service of the notice to quit, he saw the steward of the lessor of the plaintiff, and retook the premises by parol; that he had rented and held them under such parol agreement from the 25th of March, 1829, till the present time; that he ^{*was} advised that there was a valid tenancy now existing, and that he had a good defence to action. [*575]

It was contended, that the notice to quit was insufficient, for want of a full half year between the 28th day of September and the 25th of March following; [TINDAL, C. J., a customary half year is sufficient;] and that, at all events, the case was taken out of the statute by the subsequent parol agreement.

Wilde, Serjt., who supported the rule, urged, that to take the case out of the statute, a new demise ought to have been shown with precision. If there had been a new demise, the defendant would have had a good defence on the merits, to which he had not deposed.

TINDAL, C. J. What the decision of the Court might have been, if the affidavit of the tenant had been more precise, I do not say; but as he merely deposes that he retook the premises, without saying for what period, whether for a month or for a year, or on what other terms, I think, in the absence of satisfactory evidence of a new taking, that the case is within the act, and the rule must be made
Absolute.

*576] *KAY, Assignee of SHERWIN, v. GOODWIN. May 18.

The proceedings under a commission of bankruptcy sued out in 1822, were not enrolled till after the repeal of the 5 G. 2, c. 30, in 1825: Held, that they were not admissible in evidence, the 6 G. 4, c. 16, not applying to the enrolment of proceedings under commissions anterior to the act.

SHERWIN became bankrupt, and a commission was issued against him in 1822, when a deposition of one Button, proving an act of bankruptcy, was made before the commissioners.

Button died about three weeks afterwards.

Subsequently to the passing of the 6 G. 4, c. 16, and the repeal of 5 G. 2, c. 30, Button's deposition was enrolled in the way prescribed by the 5 G. 2, c. 30, and in the way prescribed by 6 G. 4, c. 16.

Being offered in evidence, in support of the plaintiff's case, on the trial of the above cause, it was objected that it had never been duly enrolled, and ought not to be received.

The 5 G. 2, c. 30, having been repealed at the time the document was carried in, there could be no enrolment under that statute; and the 6 G. 4, c. 16, s. 95, applied only to proceedings subsequent to the passing of the act.

A verdict having been found for the defendant.

Taddy, Serjt. obtained a rule nisi for a new trial, on the ground that the deposition ought to have been admitted in evidence, either under the ninety-fifth or ninety-second sections of 6 G. 4, c. 16.

Adams, Serjt., showed cause. By the ninety-fifth section of 6 G. 4, it is enacted, "That all things *done pursuant to the act* passed in the fifth year of King George II., and hereby repealed, whereby it was enacted that the Lord

*577] Chancellor should appoint a place where *all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed: and the Lord Chancellor shall be at liberty, from time to time, by writing under his hand, to appoint a proper person, who shall, by himself or his deputy (to be approved by the said Lord Chancellor), enter of record all matters relating to commissions, and have the custody of the entries thereof."

And by s. 96, "That, in all commissions issued *after the act shall have taken effect*, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received in evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid."

The enrolment of Button's deposition not having taken place till after the repeal of 5 G. 2, c. 30, it cannot be confirmed, under s. 95 above, as a thing done pursuant to that act; and the enrolment, under s. 96, is of no avail, Sherwin's commission having issued long before the 6 G. 4 took effect, while the clause is confined in its operation to commissions issued after.

By s. 92 of that statute, it is enacted, "That, if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditors' debt or debts, of the

trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained in all actions at law, or suits in equity, brought by the *assignees for any debt or demand for which the bankrupt might [578 have sustained any action or suit."

But the Court will not give a retrospective operation to this section. Under the 5 G. 2, c. 80, the proceedings of bankruptcy were recorded, like depositions taken before magistrates, merely for the purpose of preserving testimony; and when produced they were open to the same observations as any other evidence; but, under the new statute, the proceedings are made conclusive, and the effect of holding the clause retrospective will be to set up all invalid commissions of bankrupt issued previously to the act. This would operate with great hardship, both on the bankrupts under such commissions, and their debtors; on the bankrupt, by precluding him from contesting the commission, however vicious; on his debtors, by rendering them liable to repay to assignees what they may have paid to the bankrupt, when, if the commission be invalid, their payments ought to be protected. The Court will not occasion such inconvenience without the sanction of language expressly making the clause retrospective. But the language of the ninety-second clause, when that of the ninetieth and ninety-sixth sections is considered, is rather prospective than retrospective. *Key v. Cook*, 2 M. & P. 720, is an express decision on the point, and was well considered, because the Chief Justice had been at first of a different opinion.

Taddy and Andrews, Serjts., in support of the rule. As the proceedings could not be enrolled under the ninety-sixth section, at least they ought to stand under the ninety-fifth, otherwise the parties are under the hardship of being excluded altogether, which never could have been the intention of the legislature; but at all events the plaintiffs were entitled to give the depositions *in evidence under the provisions of the ninety-second section; and [579 there is a fallacy in the word *retrospective*; for the question is not [579 whether that clause is to have a retrospective operation, but rather, whether it applies to all commissions or to a particular class only. The true construction of the act is, that where the word *commission* is used generally, without any limitation, it includes commissions in existence at the time the act passed; where the legislature intended to confine it to commissions issued subsequently to the act, that intention is clothed in express words, as in section ninety-six. And this has been the principle of all the decisions with the exception of *Key v. Cook*. In *Bell v. Bilton*, 4 Bingh. 615, it was held, that before suing the surety of the grantor of an annuity in respect of arrears of the annuity, where the grantor has become bankrupt, the value of the annuity must be ascertained by the commissioners, although the annuity was granted, and the grantor became bankrupt previously to September 1825. In *Ex parte Grundy*, Montag. & M'Carthy, 313, 311, it was held that the 56th section of the act was retrospective in its operation; and that, although the event upon which a debt was contingent had happened after a commission had issued, and before the 6 G. 4, c. 16, came into operation, the sum of 2000*l.* was proveable as a debt under that commission: and the Lord Chancellor said, "such is the construction which I should be disposed to put upon the fifty-sixth section, if it stood alone; but great light is thrown upon the intention of the legislature by reference to other clauses of the act. In that immediately following, the fifty-seventh, which enables the holder of any bill of exchange or promissory note to prove for interest where interest is not reserved by the instrument, and it is overdue at the issuing of the commission, the words are, "That in all *future commissions against any person or persons liable upon any bill [580 of exchange or promissory note whereupon interest is not reserved, over [580 due, at the issuing of the commission, the holder of such bill of exchange or promissory note shall be entitled to prove for interest upon the same, to be calculated by the commissioners to the date of the commission, at such rate as is allowed by the Court of King's Bench, in actions upon such bills or notes." It is an argument fairly deducible from this section, that where the legislature intended to

confine the act to future commissions, the intention is expressed in direct terms. The same observation is applicable to the ninety-sixth and ninety-eighth clauses, the first of which commences with the words: 'That in all commissions issued *after* this act shall have taken effect,' &c.; and the second with the words: 'That *after* this act shall have come into effect,' &c. Under these circumstances, independently of what I consider to be the obvious and legitimate interpretation of the fifty-sixth section, considered by itself, I think the construction I have stated, is confirmed by adverting to the language used by the legislature in other clauses, where the operation of the enactment was intended to be confined to the future. But, the 135th section has been cited as being at variance with this construction of the fifty-sixth section. The words relied upon were: 'That nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared;' and the words which follow, 'That nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or *affect* or *lessen* any *right*, claim, demand, or *remedy* which any person now has thereunder or upon or against any bankrupt, against whom any commission has or shall have issued, *581] **except as is herein specifically enacted;*' and it was contended that the meaning of these words are, that the statute shall not be applied to commissions which existed previously to its coming into operation, except where it is expressly declared that the act shall apply. But this argument is inconsistent with the mode adopted to confine the operation of the statute in the fifty-seventh, ninety-sixth, and ninety-eighth sections, and would, in my opinion, extend the effect of the clause beyond the natural and obvious import of the words used. It remains to be observed, that the case is not devoid of authority. A question analogous to the present, and which depended upon the construction of the clause immediately preceding the fifty-sixth section, was determined by the Court of Common Pleas in *Bell v. Bilton*, 4 Bingh. 615. The judges were in that case of opinion, that where the legislature intended to confine the operation of the act to future commissions, that intention has been expressed. So far, therefore, as there is any analogy between the fifty-fifth and fifty-sixth sections, I consider the decision in *Bell v. Bilton* to be in point. There have also been decisions in this Court, which appear to have been grounded upon a similar construction of the statute. As to the consequences of the construction to which I have adverted, it was contended at the bar that it may be productive of hardship in particular cases. It is certainly possible that it may; but in other cases, as in that before the Court, it will operate beneficially; and in the majority of instances that can be stated, I think it will prove advantageous to creditors, and give full effect to the remedy intended by the legislature."

In *Cuming v. Welsford*, ante, 502, an execution on a final *judgment *582] by *nil dicit*, was held to be within the proviso of s. 108, 6 G. 4, c. 16, although there was no concert between the parties, and the judgment was obtained before the act came into operation.

The object of the act was to produce peace between bankrupts and their creditors; it is to be construed beneficially to creditors (s. 135); and though some hardship may ensue in giving the ninety-second section the construction now contended for, the beneficial effects will greatly preponderate: nor would the hardship in any case be great, because the documents are only to be conclusive as to the matters *therein contained*, leaving it open to the bankrupt to dispute any other matters. And the language of the ninety-second section plainly has reference to commissions in existence at the time of passing the act, being in the past tense, 'if the bankrupt shall not *have* given notice.' *Key v. Cook*, is a decision of two judges only, Chief Justice Best, and Burrough, J.; and the Chief Justice having before expressed a different opinion, the case cannot be considered as conclusive.

TINDAL, C. J. It appears to me, on the best consideration which I can give this case, that the evidence which was offered at the trial was properly rejected.

The first question is, whether it could be received under 5 G. 2, c. 30, s. 41. In order to be competent evidence under that statute, it must be a deposition that was duly enrolled; and, therefore, the first question is, whether there is any power, as the law now stands, of enrolling a deposition under a commission issued before the late act. Now, it is perfectly clear, that the 5 G. 2 was repealed by the statute of the 6 G. 4, c. 16. I take the effect of repealing a statute to be, to obliterate it as completely from the records of the parliament as if *it had never passed; and, it must be considered as a law that never existed, [583 except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law. It follows, therefore, that this statute having been repealed by the 6 G. 4, the power of enrolling under the 5 G. 2 has perished with that act. Then, is there anything in the 6 G. 4 which gives a power of enrolment in a case like the present? The section which has been relied upon is the ninety-fifth, but I think that section will not bear the construction of a retrospective effect to depositions that ought to have been enrolled under the previous act. That clause says, that all things done pursuant to the act passed in the fifth year of the reign of King George II. and hereby repealed, whereby it was enacted that the Lord Chancellor should appoint a place where all matters should be entered of record, &c., shall be thereby confirmed. This is not a thing done under that statute; the depositions had never been recorded or carried to the officer who was appointed under that statute, and the ninety-sixth section, which is in continuation of the ninety-fifth, gives a sense to it by showing that the ninety-sixth section at least only refers to commissions issued after the act had taken effect. If then, this is not a deposition receiving its validity as evidence by virtue of any enrolment upon record, could it be admitted in evidence simply as a deposition by virtue of the ninety-second section of 6 G. 4? That brings us to the more important question, whether that ninety-second section has a retrospective effect; or, more properly, whether it has any operation on commissions that were issued before the act passed: and I think the sound construction of the section, taking at the same time into consideration the ninety-third section which follows it, and also the 135th, is to hold that it would not have such operation.

*It appears to me, that if the ninety-second section is considered as affecting commissions which were then in a course of operation, it would [584 materially alter the situation both of the bankrupts and of the parties claiming a remedy under the commission. It would alter the situation of the bankrupt, because it would enable his assignees, and would enable other persons to conclude him as a bankrupt without the possibility of his contesting his bankruptcy within that period of time which the statute meant to allow him. It is only to suppose that he had been adjudicated a bankrupt more than two months before this act passed; or, that being absent from England, he had been absent a whole twelve-month, and he is at once effectually concluded to all intents and purposes, from all benefit of contesting the commission issued against him. It would also materially affect the interests of other persons, because, whenever this conclusion of evidence is to take effect, the ninety-third section has provided that parties who were called upon to pay their debts should have a power by the space of two months, to pay their money into Court during which time this question of bankruptcy might be tried; that power would also be entirely taken away from them, and this construction would entirely deprive them of the benefit of that clause.

It seems, therefore, to me, that the 135th section, which states that the construction of this act shall be such as not to affect or lessen any right, claim, demand, or remedy, which any person now has thereunder, or upon, or against any bankrupt, against whom any commission shall have issued (and so on), would not be observed if we were to put a different construction upon the act from that which I have stated.

It has been said, that there are several cases in which the construction of this act of parliament has been, that it should apply to commissions which had been

*585] issued and were then in the course of operation. That may *be the case when the law has been altered in general terms, or old provisions are re-enacted. Such a general alteration of the law will apply as part of the law of bankruptcy to commissions issued before the new law; but when new provisions are introduced which apply to particular cases, and give entirely new remedies, we must look to the very words of the sections, in order to see whether they apply or not to by-gone and then existing commissions.

It seems to me, applying that rule to the ninety-second section, that it was not the intention of the legislature that it should affect commissions then in existence.

As to any hardship that may be wrought upon the assignees of bankrupts, or upon other parties who seek their remedy under the commission, it can only be said, that the law which required enrolment under the 5 G. 2, continued up to the time of passing this act, which repealed it; and, that if they did not think proper to have recourse to it to preserve these muniments which they say are material to ascertain the rights of the bankrupts against other claimants, I can only apply to them the old maxim, *Vigilantibus non dormientibus, jura subveniunt*. It seems to me, it is their own fault that any omission has affected them.

PARK, J. I am quite satisfied from the luminous exposition which my lord has just made to the Court, that the construction which has been put upon the act now, and was put upon it in *Key v. Cook*, is the true construction.

GASLEE, J. I think there is a great deal of difficulty in this question, but considering as I do that the ninety-second and ninety-third clauses are meant to go together, and that a construction being put upon the ninety-second section *586] different from that which the Court has now put *on it, would, in its consequences, annihilate the ninety-third section as to all cases arising before the passing of this act of parliament, I am inclined to think that the construction now put upon the ninety-second section is the right one.

BOSANQUET, J. I am of the same opinion. The act of Parliament having in some sections stated what commissions that act intended to apply to, and in others used general terms, the Court ought to be very certain that the ninety-second section, which is the one now under consideration, does apply to antecedent commissions. But, after giving the best attention to the construction of that section that I am able, it does appear to me that it is impossible in this case to apply it to commissions that were issued before this act came into effect. This section, if it is to operate at all, makes the deposition when it is received, conclusive; and it seems to me that it is quite impossible to say that the section shall operate so as to make the deposition conclusive in a case such as the present, when we look to the former part of the section, which says that it shall operate, unless the bankrupt, if he shall be within the United Kingdom, within two calendar months, after the adjudication, or, if out of the United Kingdom, within twelve months after the adjudication, has given notice of his intention to dispute the commission.

Now, time was certainly given in this act in some cases, to enable a person becoming bankrupt antecedently to the act, to avail himself of the clause before the act came into effect. The act passed the 2d May, and time is given until the 1st day of September, but that time does not extend to twelve calendar months; and we must apply the same construction to this section, whether the party was within the United Kingdom, or was without the United Kingdom.

*587] *It seems to me, therefore, that it is impossible, consistently with justice, to apply this ninety-second section to the commission which is the subject of our present consideration. It is to be observed, that if the party had been disposed to avail himself of an enrolment under the former act, he had the opportunity of doing so between the time when the new act passed and the time when it came into effect, for time was given from the 2d of May till the first of September, and having suffered that time to go by, I think he cannot now avail himself of this section, which would operate unjustly if it were allowed to take effect in this case.

Rule discharged.

CLARKSON v. LAWSON. May 19.

Declaration, that defendant had libelled plaintiff, a proctor, by publishing that he had been suspended three times.

Plea, as to one of the said suspensions, that plaintiff had been once suspended by Sir J. N.: Held, that the libellous matter was thus divisible, and the plea an answer as to part.

LIBEL. See the declaration, *ante*, 266.

After the decision upon one of the defendant's pleas, as there reported, the plaintiff, who had replied *de injuriâ* to another plea, obtained leave to withdraw his replication for the purpose of demurring, upon allowing the defendant to plead *de novo*. The defendant accordingly, now put in, first, a plea to the whole declaration, on which the plaintiff joined issue; and, secondly, the following plea:—

And for a further plea in that behalf, the defendant saith, that as to the publishing, and causing and procuring to be published so much of the said supposed libellous matter as imputes or charges to or against the plaintiff, that he, before the said several times when, &c., had been once suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the *said defendant, the said defendant, by leave, &c., saith, that the said plaintiff [*588 ought not, &c., because, he saith, that the said plaintiff, before the said times when, &c., in the said declaration mentioned, to wit, on the 10th of January in the year last aforesaid, had been employed in the way of his aforesaid profession and business of a proctor by one Thomas Gillart; and afterwards and before the said several times when, &c., to wit, on the day and year last aforesaid, fraudulently and extortionately demanded of and from the said Thomas Gillart, as and for the sum of money justly due to him the said plaintiff from the said Thomas Gillart, for the work and labour of him the said plaintiff as such proctor done, performed, and bestowed in and about the business of the said Thomas Gillart in pursuance of the last aforesaid employment, and for the fees and disbursements due and made to and by him as such proctor in respect thereof, a certain large sum of money, to wit, the sum of 19*l.* 14*s.* 4*d.* Whereas in truth and in fact, the sum of money then and there justly due to him the said plaintiff in that behalf, then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.* And the said defendant further saith, that afterwards, and before the said several times when, &c., to wit, on the 13th day of February in the year last aforesaid, Sir John Nicholl, Knight, then being Judge of the Prerogative Court of Canterbury, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of the said Court in that behalf, to wit, the Rev. George Moore, Charles Moore, Esq., and the Rev. Robert Moore, registrars of the said Court; and that the said officers, by their deputy in that behalf, did afterwards, and before the said several times when, &c., to wit, on the 20th day of February in the year last aforesaid, report in the said Court to the said Sir J. Nicholl, as and being such Judge as aforesaid, according to the forms and practice of the *said Court, that, upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, [*589 to wit, the sum of 9*l.* 19*s.* 8*d.* only, had been justly found due to the said plaintiff from the said Thomas Gillart. And the said defendant further saith, that thereupon by reason of the premises, afterwards and before the said several times when, &c., to wit, on the 19th day of March in the year aforesaid, the said Sir J. Nicholl, as and being Judge of the said Court, did order, direct, and adjudge to be suspended, and did suspend the said plaintiff from exercising the business of a proctor of the said Court, for and during the space of one year then next following; and did then and there direct, that at the expiration of the space of one year, the said plaintiff should be further suspended until he should appear and publicly make faithful promise to abstain from all malpractices in the future exercise of his business as a proctor in the said Court. And the said defendant

further saith, that the said Sir J. Nicholl in that plea mentioned, and Sir J. Nicholl in the said supposed libels named, are one and the same person; wherefore the said defendant afterwards, at the said several times when, &c., did publish, and cause and procure to be published so much of the said supposed libellous matters in the said declaration mentioned as imputes or charges to or against the said plaintiff, that he the said plaintiff, before the said several times when, &c., had been once suspended in his aforesaid profession and business of a proctor as he the said defendant lawfully might for the cause last aforesaid, which are the same publishing and causing to be published the said supposed libellous matters as are in the introductory part of this plea mentioned; and this, &c.

Demurrer and joinder.

No general issue was pleaded.

*590] *Cross*, Serjt., in support of the demurrer. The plea is ill; it is no answer to any allegation on the declaration. The plaintiff complains that the defendant charged him with having been suspended three times for extortion; and it is no answer to say that the plaintiff has been suspended once. The imputation consists of a single assertion which is indivisible; the plaintiff does not complain, and probably need not have complained of the defendant's saying that he had been suspended once; that might have been at his own request, or for a single act of venial error. But the action is brought against the defendant for saying that the plaintiff had been suspended three times, and thereby imputing to him habitual misconduct. The plaintiff does not complain that he has been charged with a single error, but that he has been charged with habitual misconduct. The two charges are essentially different, and the plea which should deny or confess and avoid, does not deny or confess a libel imputing habitual misconduct, but a libel imputing a single error, which is not the libel complained of. The one offers a good ground of action, when the other perhaps might have afforded none; and it can be no answer to a well founded complaint of attack on character to say, that something has befallen the plaintiff which might not affect his character at all.

Secondly, the plea is ill for uncertainty. The declaration charges the defendant in the first count with publishing that the plaintiff had been suspended; in the second, with publishing that the plaintiff had been suspended for extortion: the charges are by no means identical, because suspension for extortion would render the plaintiff infamous; suspension generally might be for an honest cause; and the plea nowhere points out to which of the two suspensions it is meant to apply.

The introduction of the plea "as to the publishing that the plaintiff had been once suspended in his business *of a proctor, as above supposed to have been done by the defendant," is a reference to the suspensions mentioned in the declaration, and as they are two, the defendant ought to have showed to which of the two the plea pointed.

Wilde, Serjt. The plea is sufficient, the charge of which the plaintiff complains being clearly divisible. If the defendant had published that the plaintiff had been suspended on the 1st of May, the 1st of June, and the 1st of July, he might, after pleading to the whole declaration, have pleaded to so much of it as complained of the allegation of suspension on the 1st of May, for instance: and the publishing that the plaintiff was suspended three times, is, in effect, the same thing as publishing that he was suspended on three several days. The allegation is of three several incidents, and the defendant is at liberty to answer any one of them he may be able to meet: as if he had charged the plaintiff with stealing three horses, he might have justified as to one.

As to the second objection, if the charge set out in the first count be supposed to differ from that of the second, the plea is sufficient; for at all events, it refers to that charge, by pursuing the language of that count of the declaration which was, "It was strange that Mr. Peddle should have gone to the plaintiff who had been suspended three times;" but if it appears on the whole that the charges com-

plained of in the two counts are substantially the same, then the words of reference "As above supposed," sufficiently point the plea to the whole complaint made in the declaration.

Cross, in reply, insisted that the body of the plea was inconsistent with the introduction, as in *Gray v. Pindar*, 2 B. & P. 427, *where in assumpsit on a note payable by instalments; plea in bar as to the said several causes [*592 of action, except the last instalment that, "The said several causes of action did not, nor did any of them, accrue within six years;" it was holden on special demurrer, that though some of the instalments might be barred and others not, yet the introduction to the plea and the body of it were inconsistent.

TINDAL, C. J. The plaintiff has declared on a libel which imputes to him, according to the first count of the declaration, the having been suspended three times; and, according to the second count, the having been suspended three times for extortion. The plea now under consideration commences, "As to the publishing and causing and procuring to be published so much of the said supposed libellous matter as imputes or charges to or against the plaintiff that he, before the said several times when, &c., had been once suspended in his aforesaid profession and business as a proctor, above supposed to have been done by the said defendant," and justifies in the truth as to one suspension, "Wherefore the said defendant afterwards, at the said several times when, &c., did publish and cause and procure to be published so much of the said supposed libellous matters in the said declaration mentioned as imputes or charges to or against the said plaintiff that he the said plaintiff, before the said several times when, &c., had been once suspended in his aforesaid profession and business of a proctor."

On demurrer, two objections have been raised to this plea: first, that on principle the charge contained in the libel is not divisible; and secondly, that even if it be divisible, the plea is not sufficiently pointed to either of the various allegations in the declaration.

We think, however, that this charge is severable, inasmuch as the measure of damages, on an unfounded *charge of one suspension, would be different from the measure on an unfounded charge of three suspensions. The action of [*593 libel proceeds on the principle that there has been malice in the defendant and damage to the plaintiff. If the defendant can show that the supposed libel is true to its full extent, the allegation of the existence of malice seems to be answered. If he prove that the libel is true in part, the plaintiff ought not to recover damage for that part of the imputation so proved to be true. And it would be hard if it were otherwise: for if that part contained, as it often might, the substance of the charge, and the defendant were precluded from pleading because he could not answer the whole, the plaintiff might recover damages in a case where there was neither injury nor malice. I agree that when the charge complained of is not severable in its nature, the defendant must justify to the full extent of the charge. Upon a charge of murder, for instance, it would be no plea to allege that manslaughter had been committed, because such a plea would not confess what was imputed or any part of it. But here, when the defendant says that the plaintiff was suspended three times, it is no more than saying he was suspended once on such a day, once on such another day, and once on a third day; and there can be no doubt he may confine his justification to one of the days, leaving the plaintiff to establish the damage resulting from the residue of the charge. In *Stiles v. Nokes*, 7 East, 492, the Court expressly says, "The party who requires the separation to be made for his own defence, ought to have taken upon himself the burden of doing it, in order that the Court might see with certainty what parts he meant to justify." "A plea of justification may be good with a general reference to certain parts of the libel set forth *in the declaration, if the Court can see with certainty what parts are referred to; as if the reference be to so much of the libel as [*594 imputes to the plaintiff such a crime (e. g. perjury), that would be sufficient without repeating all those parts again, which would lead to prolixity of plead-

ing, and ought to be avoided." And the plea in that case was only held ill, because the various component parts of the libel had not been sufficiently separated by the pleader.

This is a sufficient answer to the first objection. The second is, that the plea is not sufficiently pointed to the particular charge in the declaration which it is intended to meet; but it is, clearly, sufficiently applicable to the charge in the first count of the declaration, as it pursues the express language of that charge; and I am further inclined to think that by the words of reference, "above supposed to have been done by the said defendant," it may be taken sufficiently to refer to the charge of suspension for extortion.

PARK, J. I am of the same opinion. The plea is, at all events, by the words of reference, sufficiently applicable to the charge on the first count, and is perfectly good in other respects. The imputation complained of, has, in effect, three dates; for, as Lord Stowell and Sir John Nicholl do not sit in the same court, the alleged suspensions must have taken place at different times; and, as in the case which has been put, of a charge of stealing three horses, there seems to be no reason why the defendant should not justify as to one.

GASKELL, J. If a party, who charges a plaintiff with having incurred three different punishments, would pay greater damages than if he had alleged only one, he must be permitted to put on record, or to give in evidence, under the *595] general issue, whatever would *exempt him from a portion of the damages sought to be recovered. I am rather inclined to think that the fact of a single suspension could not have been given in evidence under a general issue on this declaration; and, therefore, the party is compelled to plead it. The introduction of the plea being pointed to the plaintiff's having been once suspended, that suspension necessarily means, a suspension according to the manner charged in the declaration; and to the first count, at least, it distinctly applies: but the plea goes on to show, in common parlance, a suspension for extortion; for it says, "That, upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l*. 19*s*. 8*d*. only, had been justly found due to the said plaintiff, from the said Thomas Gillart; and that, thereupon, by reason of the premises, afterwards and before the said several times when, &c. the said Sir J. Nicholl, as and being judge of the said court, did order, direct, and adjudge to be suspended, and did suspend, the said plaintiff from exercising the business of a proctor in the said court."

BOSANQUET, J. I am of the same opinion. One plea having been pleaded to the whole declaration, there has been no discontinuance; and the defendant has a right to put a second plea on record, applicable to a portion of the charge only, where the matter is, in its nature, severable. The libel here imputes to the plaintiff three distinct suspensions; and it certainly is open to the defendant to justify as to one of them, and lessen the damages accordingly; for the suspensions must have been in themselves separate acts.

Then, as to the applicability of the plea, if it be taken as a plea to the charge of suspension, without specifying the cause of suspension, it is, at all events, *596] applicable to the first count. But I think the introductory part of *the plea applies as well to the second as to the first count. "Above supposed to have been done," means, as supposed by the declaration; and then the justification is for matter which, in the popular sense of the word, imports extortion.

Judgment for the defendant, on the second plea.

ASHWORTH and Others v. HEATHCOTE. May 22.

A cause in which there was no notice of set-off having been referred by order of *Nisi Prius*, the Judge, during the assizes, made a second order to enable the defendant to give a particular of set-off:

Held, that the 1 G. 4, c. 55, did not authorize this second order.

By an award in this cause, after reciting "That, by a certain order of *nisi prius*, made at the assizes holden at Stafford, in and for the county of Stafford, on the 6th of August, in the year of our Lord 1829, a certain cause, wherein John Ashworth the elder, John Ashworth the younger, and Thomas Ashworth, were the plaintiffs, and Richard Edensor Heathcote, Esquire, was the defendant, was referred to B. H. M., Esquire, to settle that cause, and all matters in difference between the said parties, or any or either of them; and that also, by a certain other order of *nisi prius*, made at the same assizes, a certain cause, wherein the said Thomas Ashworth was the plaintiff, and the said Richard Edensor Heathcote was the defendant, was referred to the said B. H. M. to settle that cause and all matters in difference between the said parties therein; and that it was afterwards agreed by and with the consent of the counsel for the said several parties, that the said several orders should be acted upon as parts of one and the same order; and that also, by a certain order made on the 24th of July, 1829, by the Honourable Sir Stephen Gaselee, one of the Judges of the Court of Common Pleas, in the said last-mentioned cause, it was ordered *that the defendant's attorney or agent should, within four days, deliver [*597 to the plaintiff's attorney or agent an account in writing, with dates, of the particulars of the defendant's set-off, and in default thereof that he should be precluded from giving evidence in support of such set-off at the trial of the cause; and that no such account was delivered within four days from the date of such order, or at any time before the said cause was called on for trial and the said last-mentioned order of *nisi prius* was made therein; and that after the making of the said last-mentioned order of *nisi prius*, and after the first meeting of the said reference, but during the continuance of the said assizes, that is to say, on the 10th of August in the year aforesaid, a certain order was made in the said last-mentioned cause by the Hon. Sir John Vaughan, one of the judges of the said assizes, whereby it was ordered that the defendants should be at liberty forthwith to deliver the particulars of set-off in that cause, and such particulars were accordingly delivered forthwith;

The arbitrator ordered, that a verdict should be entered for the plaintiffs in the said first-mentioned action, for the sum of 70*l.* 6*s.* 4*d.* damages; and awarded and adjudged that the defendant, in the said secondly mentioned cause, was indebted to the plaintiff in the sum of 60*l.* 10*s.* 2*d.*, on the causes mentioned in the last seven counts of the declaration of the plaintiff; but that the plaintiff was indebted to the defendant in a larger amount on the causes mentioned in the particular of set-off delivered as above mentioned; and thereupon directed, that if the Court should be of opinion that the evidence of such set-off was admissible in the cause, then the verdict in the last-mentioned cause should be entered generally for the defendant; but, if the Court should be of opinion that the evidence of such set-off was not admissible in the said cause, but only as a matter *in difference between the parties, then the verdict in the last-mentioned cause should be entered for the plaintiff upon the said last [*598 seven counts of the declaration for the sum of 60*l.* 10*s.* 2*d.* damages, and for the defendant upon the other counts of the declaration. And further, that the plaintiff should, in no case, be entitled to receive the said sum of 60*l.* 10*s.* 2*d.* of and from the said defendant, nor the defendant to receive any sum from the plaintiff, on account of the said set-off; but that the account between them should be considered as finally closed and balanced, except as far as regarded any payments to be made under and by virtue of that award. And lastly, that each of the said parties should bear and pay his and their own costs of that reference.

Wilde, Serjt., obtained a rule *nisi* to enter up in the second cause, a verdict

for the plaintiffs for 60*l.* 10*s.* 2*d.*, on the ground, that after the order of reference, the learned Judge was *functus officio*, and had no authority to make an order enabling the defendant to prove his set-off, especially as there was no particular of set-off, after a former order to deliver one, and the defendant could not have entered on any such proof had he gone before a jury.

Russell, Serjt., showed cause. By 1 Geo. 4, c. 55, s. 5, after reciting "That it is expedient that the justices of the Courts of King's Bench and Common Pleas, and the Barons of the Exchequer at Westminster, and the justices of Chester, should have power and authority, upon their respective circuits for taking the assizes, to grant summonses, and to make orders in actions and prosecutions in the manner hereinafter-mentioned," it is enacted, "That from and after the passing of this act, it shall and may be lawful for the justices of the Courts of

*599] King's Bench and Common Pleas, and the Barons of the *Exchequer at Westminster, and the Justices of Chester, and each and every, or any one of them, during their respective circuits for taking the assizes, to grant such and the like summonses, and make such and the like orders in all actions and prosecutions which are or shall be depending in any of his Majesty's Courts of record at Westminster, in which the issue, if brought to trial, would be to be tried upon such their respective circuits, as if such justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, and Justices of Chester, were respectively judges of the Court in which such actions or prosecutions are or shall be depending, although such respective Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer, and Justices of Chester, or any of them, may not be judges of the Court in which such actions or prosecutions are or shall be depending; and such summons and orders shall be of the same force and effect as if such Justices of the Courts of King's Bench and Common Pleas, and Barons of the Exchequer at Westminster, and Justices of Chester, were respectively judges of the Court in which such actions or prosecutions are or shall be depending."

The judges of assize, therefore, have the same power of making an order in the cause, as any judge of the court in which the cause is depending; and a judge of the court in which the cause is depending might have made such order. An order for further time to deliver particulars, either of demand or set-off, is a common practice. The only question therefore is, whether, upon a cause having been referred, a judge has the power of making such an order respecting such cause as justice may appear to him to require.

The cause was not out of court, and applications might be made respecting it. *600] Thus it has been held, that a *party may apply for a rule to show cause why the opposite party should not attend before the arbitrator; or why the arbitrators should not be directed to make their award without waiting for such attendance. In the case of *Hetley v. Hetley*, Excheq. Mich. Term, 1789, cited in *Kyd on Awards*, 101, where a reference had been made of certain causes of action relating to the adjustment of a long train of accounts, every item of which was contested, and one of the parties neglected to carry in his vouchers before the time originally limited to the arbitrator for making his award, and the time had been repeatedly enlarged, in order to give him an opportunity of doing so, the Court made a rule upon such party to produce his vouchers before a certain day, and further to enlarge the time for making the award; and that if he still should neglect to attend, the arbitrator should proceed upon hearing the other party alone. And the order of reference may be amended. The Court of Common Pleas amended an order of *Nisi Prius* (made a rule of court), by inserting certain omitted matters which were incident to the substance of the agreement between the parties: *Evans v. Senor*, 5 Taunt. 662.

So, where an order of *Nisi Prius* had been obtained upon the usual terms of filing no bill in equity, the Court permitted it to be amended by striking out those words, as it appeared that a bill in equity was necessary in order to attain the justice of the case: *Grimstone v. Bell*, 4 Taunt. 254. In the present case, the order of Mr. Baron Vaughan could not operate beyond an amendment of

the order of reference, and was made according to the justice of the case between the parties.

Wilde, contrd, was stopped.

*TINDAL, C. J. The point is exceedingly simple. This was a reference of a cause at *Nisi Prius*: that is, of the cause as it then stood, without any particular of set-off, after a notice to deliver one, which is the same as if there had been no notice of set-off. After the reference the Judge made an order, that a particular of set-off might be delivered, which was virtually to put the defendant in a situation, circumstanced as the cause then was, in which he had no right to stand. The Judge could not remedy the consequences of the defendant's neglect; and the making this rule absolute will occasion no injustice, for the party will stand in the same situation as if he had gone to a jury. No set-off being suggested on the record, the verdict must have gone against him. [*601]

PARK, J. I am of the same opinion. By 1 G. 4, c. 55, s. 5, the Judge at the assizes is permitted to make such orders as if he were a Judge of the Court in which the cause is depending, but he has no jurisdiction when the cause is out of Court. In *Rawtree v. King*, 5 B. M. 167, the Court said they could not amend an order of reference.

GASELEE, J. The party has placed himself in this situation by his own neglect.

BOSANQUET, J., concurring, the rule was made

Absolute.

*CHAPMAN v. PRICKETT. May 24.

[*602]

Devise of testator's freehold messuages, stock in the funds, money and debts, and all shares or property which he might be possessed of or entitled to, to trustees and their executors, in trust for testator's wife and children, &c.

Codicil devising testator's copyhold to his wife till the expiration of certain leases, and after that to be sold, and the money to be placed in the funds for the benefit of testator's children, as directed in the will:

Held, that the trustees took no interest in the copyhold, and that the wife's interest terminated on the expiration of the leases.

THIS was an action of replevin for taking and detaining the plaintiff's goods in a dwelling-house, at St. Mary's, Islington.

The defendant pleaded several cognisances, viz.

1st. As bailiff of John Hodsoll, under a distress for 126*l.* for three years' rent, due 25th March, 1828, under a demise, at the yearly rent of 42*l.* payable quarterly.

2dly. The like for 42*l.*, one year's rent, due to John Hodsoll, 25th March, 1828.

3dly. The like cognisance as bailiff of John Burton, for 126*l.* for three years' rent, due 25th March, 1828, under a demise, at the yearly rent of 42*l.* payable quarterly; and

4thly. The like avowry for 42*l.* for one year's rent, due to S. Burton, 25th March, 1828.

Pleas in bar,

1st. That plaintiff did not hold or enjoy as tenant to said John Hodsoll, or said John Burton, as stated in the several cognisances, and

2dly. That no rent was in arrear.

Upon the trial of the cause before Tindal, C. J., a verdict was taken for the plaintiff for the sum of 4*l.* 4*s.* with liberty to enter a verdict for the defendant for 126*l.* the rent distrained for, subject to the opinion of the Court on the following case:—

The premises in question, a dwelling-house in the parish of St. Mary, Islington, were copyhold, holden of the manor of Barnesbury.

Thomas Lambe being seised thereof according to the custom of the manor, *603] and having surrendered the same *(amongst other copyhold premises held of the said manor) to the uses of his will, and being also seised of several freehold estates, by his will, bearing date 21st June, 1804, duly executed and attested to pass real estates, gave and devised, among other things, as follows :

"I give and devise unto John Hodsoll, of Cary street, Lincoln's Inn, Esquire, and Joseph Boucock, of the Old Baily, stone mason, and the survivor of them, or the executors, or administrators of such, all those my freehold messuages in Furnival's Inn Court, Holborn, and also all my stock or shares in any of the public funds, and all money in hand, or debts due to me, to be placed in the 3 per cent. Consols Bank of England; and all shares or property whereof I may be possessed or entitled to, upon this special trust and confidence, that they my said trustees shall and do permit and suffer my wife, Maria Dove Lambe, to receive and take for and during the term of her natural life, all rents and profits of the said messuages, and all other freeholds or leaseholds that I may be possessed of, and the entire dividends and proceeds of the said stock or shares in the Bank of England, except the presents hereinafter mentioned, for the support and maintenance of herself, and all my legitimate issue, which I now have, or may hereafter have by her, except as follows; that is to say, in case my reputed son, known by the name of Thomas Lambe, shall live to attain the age of twenty-one years, I will and direct that they my said trustees shall and do with all convenient speed, transfer and assign over to him 200*l.* stock of the 3 per cent. Consols of the Bank of England, part of my stock or share therein, and to have no other claim on my property whatsoever, but to be in full of all bequests from me to him : and I do hereby further will and direct my said trustees to assign and transfer unto such and every of my lawful children the like *604] sum of 400*l.* *3 per cent. Consols, part of my stock or share therein, when and so soon as they shall respectively attain their respective ages of twenty-one years : and from and after the decease of my said wife, and all my children have attained the age of twenty-one years, I will and direct that my said trustees, or the survivors of them, or the executors, or administrators of such survivors, do and shall make an equal division among and between all my said children and their heirs, of my said three freehold messuages either by sale or otherwise, as may be deemed most conducive to the interest of my said children; and also do and shall in like manner transfer over unto my said children all the remaining part of my stock or share in the 3 per cent. Consols, Bank of England, and all stock or shares, my property, estate, and effects, and to divide the same in equal shares and proportions among and between all my said children and their heirs."

And the said testator thereby appointed the said John Hodsoll and Joseph Boucock, and his widow, executors, and executrix of his will.

The testator afterwards made the following codicil.

"I, Thomas Lambe, do hereby will and direct that my copyhold estate, in Church street, Islington, be transferred to my beloved wife, Maria Dove Lambe, until the expiration of the leases, and after that time, as soon as convenient, or within one year, to be sold by public auction, the money to be placed in the 3 per cent. Bank of England stock, for the benefit of my children, and their heirs, as directed in the will. If it should please God to call her before that time of the expiration of the leases, the copyhold to be sold by public auction, soon as convenient, and the money placed as above directed. N. B. If there should not be money sufficient in my possession at the time of my decease to pay the *605] fine of the copyhold, proving the will, and *funeral expenses, my executors to sell out of the 3 per cent. Consols 600*l.* or a small sum as may be required.

"Witness my hand, Thomas Lambe."

The testator died, without having altered or revoked his will or codicil, on the 11th of May, 1806, seised of the copyhold in question.

The testator left his wife, the said Maria Dove Lambe, and three lawful children by her, surviving himself, viz. Joseph Lambe, Maria Dove Lambe the younger, and Harriett Lambe.

The will and codicil were proved by the widow and the said John Hodsoll and Joseph Boucock in the prerogative court of Canterbury, on the 23d of May, 1806.

On the 11th of July, 1806, the said John Hodsoll and Joseph Boucock were admitted tenants of the premises in question on the court rolls of the manor as devisees in fee at the will of the lord, pursuant to the will and codicil of the testator, and upon the trusts therein mentioned. The admission stated the testator's surrender to the use of his will, his devise to Hodsoll and Boucock of "all his property whereof he might be possessed or entitled," upon certain trusts in the will and codicil particularly mentioned, and described the copyhold tenements, of which the lord of the manor by his steward did deliver seisin by the rod according to the custom of the manor, to hold the said premises, with the appurtenances, unto the said Hodsoll and Boucock, *and their heirs*, pursuant to the said will, of the lord of the manor, by the rod, &c.

The said Maria Dove Lambe, the widow, on the 12th of August, 1807, intermarried with John Burton, one of the persons under whom the defendant made cognisance; and she died on the 23d of November, 1823, without having had issue by the said John Burton.

The three legitimate children of the testator all died *in the lifetime of their mother under the age of twenty-one years, unmarried and without issue. [*606]

Letters of administration of the personal estate of the said Mrs. Burton, and of the testator's three infant children, were granted by the prerogative court of the Archbishop of Canterbury to the said John Burton at the times following: namely, of the personal estate of the said Mrs. Burton, on the 3d of February, 1824; of the said Joseph Lambe, Maria Dove Lambe the younger, and Harriett Lambe, on the 9th of February, 1824.

The said Joseph Boucock died on the 5th of February, 1825, leaving the said John Hodsoll, who was the other person under whom the defendant made cognisance, him surviving.

The lease mentioned in the will of the premises in question expired the 25th of December, 1821.

Plaintiff was let into possession by Mrs. Burton in October 1823, to hold from Michaelmas preceding, at the yearly rent of 42*l.*, payable quarterly; and remained in possession from that time up to the time of the distress.

The question for the opinion of the Court was,

Whether, upon the facts stated, the defendant was entitled to a verdict upon any or either of the cognisances before mentioned.

If the Court should be of opinion the defendant was entitled to a verdict under either of the said cognisances, then a verdict was to be entered for the defendant for such sum as the Court should direct, and the value of the goods distrained to be taken as of the value equal to the rent in arrear.

But if the Court should be of opinion that the defendant was not entitled to a verdict upon either of the cognisances, then the verdict was to stand.

This case was argued twice. *Wilde and Scriven*, *Serjts., for the plaintiff. *Laves and Taddy*, Serjts., for the defendant. [*607]

For the plaintiff it was argued, that none of the cognisances could be sustained: for first, the copyhold did not pass under the will to the trustees; and secondly, whatever interest in them passed to the widow of the testator under the codicil, determined on the expiration of the leases in 1821, or at all events on her death; so that her executor had no interest during any portion of the time covered by the cognisances under him.

The copyholds did not pass. The word *property*, the only word on which an argument can be raised, has always been construed to mean personal property, unless an intention appear on the will that it should be applied to freehold.

From *Rose v. Bartlett*, Cro. Car. 292, to *Thompson v. Lawley*, 2 B. & P. 303, this has been the uniform decision of the courts: and any generality of expression in a will may be limited by particularity of intention, made apparent in other parts of the will or codicil: *Timewell v. Perkins*, 2 Atk. 102, *Rowe v. Yeud*, 2 N. R. 214, *Doe v. Hurrell*, 5 B. & A. 18, *Newland v. Marjoribanks*, 5 Taunt. 268, *Doe v. Rout*, 7 Taunt. 79, *Monk v. Mawdsley*, 1 Sim. 286, *Woolam v. Kenworthy*, 9 Ves. jun. 137. Here, so far from any intention to pass real property of any kind under the word *property*, a contrary intention plainly appears: for the testator having first disposed of his freehold property, then proceeds to his personalty; namely, stock in the funds, money in hand, debts due, and then, all shares or property of which he might be possessed; clearly meaning property of the same nature as shares. But the codicil makes the matter still plainer, for he there disposes of the copyhold as something which he *608] had *omitted to pass by his will; and the trustees, being neither named in nor referred to by the codicil, can take nothing under it.

The circumstance of their having been admitted makes no difference in the case, because admission will not confer any interest on a party who possesses none independently of such an admission, nor, if he have any interest, will the admission, however extensive in its terms, confer a greater interest than he is really entitled to. Co. Copy, s. 41. *Baddeley v. Leppingwell*, 3 Burr. 1533, *Zouch v. Forse*, 7 East, 186.

But assuming that the trustees took any interest under the will, or codicil, or both together, they took it only for the purposes of carrying into execution the trusts of the will and codicil; they would, therefore, take no greater interest than was necessary for the due execution of the trusts; *Doe v. Simpson*, 5 East, 162, *Doe v. Barthrop*, 5 Taunt. 382, *Doe v. Nicholls*, 1 B. & C. 336, *Doe v. Timins*, 1 B. & A. 530, *Hawker v. Hawker*, 3 B. & A. 537; and a fee was not necessary for the purposes of the present will: a mere power to sell would have sufficed.

For the defendant it was argued, that the trustees took a legal fee under the will and codicil taken together, in order to enable them to carry into execution the trusts expressed therein. Unless they took a fee when they entered on the trust, they could not have been in a situation to sell and divide the property after the death of the widow; and if they once took a fee, there was nothing in the will to defeat that amount of interest at a subsequent period. It could scarcely be disputed that they took an interest greater than for life by the express *609] words of the will, and if so, such an *interest could only be abridged or defeated by something incompatible with it appearing on the will.

In *Doe v. Nicholls*, 1 B. & C. 336, where a testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, *to be transferred* to him as soon as he should attain to twenty-one years of age; and, in case he should die before he attained to the age of twenty-one years, then to A. B., his heirs and assigns: It was held, that the trustees took in the copyhold lands an estate for years determinable on the son's attaining the age of twenty-one years, or by his death before that period.

But if anything remains to be done by the trustees, though a mere matter of form, as, to support contingent remainders; *Biscoe v. Perkins*, 1 Ves. & B. 485; their estate continues.

Then, the word *property* in the will was sufficient to pass copyhold, if such appeared to be the testator's intention; *Nicholls v. Butcher*, 18 Ves. jun. 193, *Noel v. Hoy*, 5 Madd. 38; and assuming such intention to be apparent, the operation of the word is not limited by its being accompanied with words designative only of personal property, as *shares*, &c.

In *Doe v. Langlands*, 14 East, 370, a testator possessed of real and personal property, after several pecuniary legacies, "gave and bequeathed all and every the residue of his *property*, goods and chattels, to be divided equally between A. and B., share and share alike, after all his debts paid;" the personalty was not quite sufficient to pay all the debts and legacies, but it was held, that the word

property, though thus followed by *goods and chattels*, was sufficient of itself to carry the realty.

And in *Doe d. Andrew v. Lainchbury*, 11 East, 290, it was held, that a devise of all the residue of the testator's "money, stock, *property*, and *effects*, of what kind or nature soever," to A. and B., "to be divided equally between *them, share and share alike," would pass *real* as well as *personal* [*610 estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating, "as to my money and *effects*, I dispose thereof as follows," &c., and then proceeded to dispose of parts of his *real* estate.

Now, it cannot be supposed that the testator here meant to die intestate as to his copyhold property, after having expressly mentioned it in his codicil. But, by his codicil, he does not devise the copyhold to his widow immediately; he directs "that it be transferred to her." And unless it passed to the trustees under the word *property* in the will, who was to transfer it? This transfer was one of the trusts for which the trustees were named. There is no ground for the argument that a mere power would have sufficed, since the devise to the trustees is direct, and conveys an interest. It is a devise to them in trust to sell, &c., and not a mere direction that the property shall be sold. Co. Lit. s. 169. Sugd. on Powers, 174, and the authorities there cited.

Assuming, then, that the widow had a trust estate in the copyhold, her connexion with the trustees is sufficient to raise a privity between them and the tenant. In *Gree v. Rolle*, 1 Ld. Raym. 716, an entry by a *cestui que* trust was held sufficient to prevent the statute of limitations from running against the trustee. The death of the widow did not determine her interest; it only enabled the trustees to sell according to the trusts of the will: and till they have effected a sale, the widow's interest continues in her executor.

Cur. adv. vult.

TINDAL, C. J. This is an action of *replevin*, in which the defendant first makes cognisance as bailiff of John *Hodsoll for rent due the 25th of March, 1828; and secondly, as bailiff of John Burton for the same rent; [*611 and the question raised by this special case becomes this,—whether the trustees took such estate in the copyhold under the will or codicil as to support the cognisance in the name of the surviving trustee, or whether the wife took such interest therein under the codicil as to support the cognisances in the name of her personal representative.

And looking at the will and codicil, which are framed very inartificially, with the view of discovering the intention of the testator, we think he did not intend to pass by his will any interest in the copyhold premises in question to the trustees named therein.

The testator appears to have known the distinction between freehold, copyhold, and leasehold property; for his will begins with the express devise to his trustees of three freehold messuages, and then gives direction as to the rents and profits of the same messuages, and all other *freeholds* or *leaseholds* that he might be possessed of, and lastly directs the division of his said three *freehold* messuages, either by sale or otherwise, amongst his children. Looking, therefore, at the will alone, we see no words which would comprehend the copyhold within the devise to the trustees, for the word *property* in the will cannot be held to refer to real property without doing violence to the context of the clause in which that word occurs; and when it appears that the testator, after making his will, though how long after is left uncertain, makes a codicil specifically disposing of his copyhold, it affords a strong ground of inference that the testator thought his copyhold property was not included in his will; and it still further supports this construction, that the general effect of the disposition of the copyhold by the codicil is the same as that of the freehold which had already passed by the will, viz. that the wife of the testator should receive the rents and profits during her *life, and after her death a sale should take place and a division be made amongst the children. So that the disposition of the [*612

copyhold made by the codicil would appear to have been unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will.

If, then, the copyhold did not pass by the will, as we think it did not, so neither did it pass to the trustees by the codicil; for they are not named in the codicil either expressly or by any necessary implication: so that, upon the whole, there appears no estate in the trustees out of which the relation between landlord and tenant could be created, and the cognisances in the name of the surviving trustee do therefore altogether fail.

The second cognisance depends on the nature of the interest which the wife took under the codicil: and it appears to us that it was the manifest intention of the testator, that her interest in the respective parts of the copyhold should be co-extensive with the leases which were then in existence of those respective parts, unless in the event of her death before the determination of the respective leases, in which case her interest was to determine with her life. And as the case finds that the lease which includes the premises for the rent of which this distress was taken, expired on the 25th of December, 1821, it follows that the whole of the rent distrained for accrued since the time when the wife's interest under the codicil had expired, and consequently that there could be no holding by the tenant under her personal representative.

We therefore think, upon the second cognisance also, the verdict must be entered up for the plaintiff; that he did not hold under Burton, as the defendant has alleged; and that, upon the whole, the verdict is to stand as entered for the plaintiff.

Judgment for the plaintiff.

*613]

*DOE dem. PEARSON v. ROE. May 24.

A mortgagee is not permitted, under 11 G. 2, c. 19, to come in and defend as landlord in ejectment, unless he be interested in the result of the suit.

STOKES, Serjt., had obtained a rule nisi for a mortgagee to be permitted to defend in this cause as landlord.

The affidavit of the mortgagee, on which the motion was made, did not state that the mortgagee had any interest in the question between the contending parties; on the contrary, it was rather to be collected that the mortgagee was put forward to serve the purposes of the tenant; upon which,

WILDE, Serjt., who showed cause, contended that the Court ought not to permit the mortgagee to defend as landlord, unless he had an interest in the question between the parties.

STOKES. He may be presumed to have an interest in any question touching the land conveyed to him, and is always admitted to defend, unless a case of collusion be clearly made out. Doe d. Tilyard v. Cooper, 8 T. R. 645.

TINDAL, C. J. This is a motion under the 11 G. 2, c. 19, by which the Court is enabled to allow the landlord to make himself a defendant in an ejectment for property demised by him, upon certain terms prescribed by the statute; and, under that statute, a mortgagee has sometimes been considered as a landlord. But the question to be considered in all cases is, whether he be himself

*614] interested in the result of the suit, or whether he be *merely set in motion for the purposes of some other person; and, upon the affidavits before us, we think that the latter is the case in this instance. The mortgagee does not swear that he is himself interested in the result, and it is probably immaterial to him under whom the tenant immediately holds. We think, therefore, he does not bring himself within the terms of the act, by showing that this is his own motion, and the rule must be

Discharged.

BLOGG v. KENT. May 24.

Plaintiff declared on an agreement to employ him at the end of a year. Defendant pleaded the general issue, and that there was no memorandum in writing of the agreement, as required by the statute of frauds. Plaintiff replied, that there was such a writing :

Held, he was bound to permit an inspection of it by defendant, although it consisted only of a letter from defendant's agent.

THE plaintiff declared on an agreement to take him into a certain employment at the end of a twelvemonth.

The defendant pleaded, first, the general issue ; secondly, that there was no memorandum of the agreement in writing signed by the party to be charged, or his agent, as required by the statute of frauds.

The plaintiff replied, that there was such a writing ; on which the defendant joined issue, and obtained a judge's order for an inspection of the writing.

Taddy, Serjt., moved to discharge this order, on an affidavit that the writing referred to in the replication consisted only of letters from the defendant's agent.

He submitted, that such letters did not constitute the agreement, but were merely evidentiary of it ; and that therefore the defendant was not entitled to an inspection.

* *Wilde*, Serjt., who showed cause, urged, that upon these pleadings the plaintiff could not succeed, unless he showed an agreement in writing ; and as he admitted by his replication he held such a writing, he must, upon the principle of all the cases on the subject, be considered a trustee for both parties, and bound to produce the writing. [*615]

Taddy. The present case goes beyond all that have preceded it, in calling for documents which are only evidence of a contract, and not the contract itself. If the defendant had pleaded the general issue only, he would not have discovered the existence of the writing ; and he ought not to be placed in a better situation by putting on the record a plea unnecessary to his defence, since the matter advanced in it might have been taken advantage of under the general issue.

TINDAL, C. J. Upon the whole of these pleadings it appears that there is a memorandum in writing of the agreement, on which the plaintiff proceeds. I think no objection arises from the circumstance of there being two pleas ; for the purposes of this application it must be taken as if there were but one, and then the replication virtually inserts in the declaration an averment of an agreement in writing. It appears that one party only has a copy ; and it comes round to the ordinary case, that where there is only one copy of the contract in dispute between the parties, the party who holds it is a trustee for the production of it to the other party. The writing, therefore, must be produced to the defendant, and the rule for setting aside the judge's order be Discharged.

*GODEFROY v. JAY. May 24.

[*616]

A plea of privilege, after a special imparlance, is ill on demurrer ; but the plaintiff cannot treat it as a nullity, and sign judgment.

IN this action the defendant, after imparling with a saving of all exceptions to the writ, pleaded his privilege as an attorney of the Court of King's Bench.

The plaintiff treated the plea as a nullity, and signed judgment ; whereupon *Cross*, Serjt., obtained a rule nisi to set aside the judgment as irregular.

Wilde, Serjt. The plea is a nullity, and the plaintiff is entitled to judgment. It is a plea to the jurisdiction of the Court ; *Chatland v. Thornley*, 12 East, 544 ; and a plea to the jurisdiction of the Court cannot be pleaded after a special imparlance, with a saving of all exceptions to the writ, bill, or count : if it be proposed to plead such a plea after imparlance, the plaintiff must obtain, by ap-

plication to the Court within the first four days of term, a *general special* imparlance, with a saving of all advantages and exceptions *whatsoever*: 2 Wm. Saund. 2, n. (2); Bac. Abr. *Abatement* (O). Without such a condition, it would be inconsistent for the defendant to disclaim the jurisdiction of a Court of which he had claimed an indulgence.

Cross. This is not a plea to the jurisdiction, but a plea of privilege; and Bac. Abr. *Pleas* (E.), and Gilb. Hist. C. P. 185, are authorities to show that it may be pleaded after a special imparlance. Even if it were otherwise, the question is at least a question of nicety and difficulty, which was debated on demurrer in *Wentworth v. Squibb*, 1 Lutw. 43, 640; and the plaintiff *617] should have demurred or have applied to the Court, instead of snapping a judgment and treating as a nullity a plea the validity of which was at least a matter for discussion.

TINDAL, C. J. We think that this plea would not have been sustainable, if demurred to: at the same time, as the question involved a point of nicety, the party was not entitled to treat the plea as a nullity. The judgment, therefore, must be set aside, on condition of the defendant's pleading to the merits of the action.

Rule absolute.

CARTER, Assignee of PEER, a Bankrupt, v. BRETON. May 24.

After a secret act of bankruptcy by P., defendant accepted a bill of exchange for him for 98*l.* at three months, which P. paid to a creditor standing by; later, in the course of the same day, P. agreed to sell defendant four horses as security for 70*l.* of the 98*l.* The horses were subsequently delivered to the defendant, who paid the 98*l.* bill when it became due: Held, that the transaction was not protected by the eighty-second section of 6 G. 4, c. 16.

TROVER by the plaintiff, as assignee of Peer, for four horses.

At the trial before Tindal, C. J., Middlesex sittings after Hilary term, it appeared that after Peer (a coach proprietor) had committed the act of bankruptcy on which the commission issued, and which act was unknown to the defendant, the defendant accepted a bill of exchange for 98*l.* at three months for Peer's accommodation; this bill was immediately transferred by Peer to Bamford, one of his creditors, who carried it away.

After this transaction, but in the course of the same day, Peer and the defendant had a conversation as to security to be given to the defendant in consideration of his acceptance; and it was agreed between them that Peer *618] should sell to the defendant, for 70*l.*, the four horses which were the subject of the present action. In order to accommodate Peer, he was permitted for a short time to continue to employ them with his coach; but they were subsequently delivered to the defendant, who paid the 98*l.* bill when it became due. The commission was issued against Peer within two calendar months of the defendant's accepting the bill of exchange. The jury found that there was a *bonâ fide* sale of the horses, and gave their verdict for the defendant.

Spankie, Serjt., obtained a rule *nisi* for a new trial on various grounds, but the decision of the Court turning exclusively on the question, whether or not the above transaction amounted to a sale under the eighty-second section of 6 G. 4, c. 16, this report of the previous discussion is also limited to that point.

Wilde, Serjt., who showed cause, relied on the finding of the jury: he maintained also that the whole dealing between the defendant and Peer was one transaction; that the defendant had in effect purchased the horses, by paying, at Peer's request, a creditor of Peer's; that it was immaterial whether the horses were paid for by money or bills, and equally so whether the money or bills were put into Peer's hands, or at his request into the hands of his creditor standing by. The manifest object of the statute was to protect *bonâ fide* transfers, and there was nothing to impeach the *bona fides* of this.

In *Hill v. Farnell*, 9 B. & C. 45, where A. purchased of B., a hop merchant,

a library, and paid him the value, and B., at that time, had committed an act of bankruptcy, of which A. had no knowledge; it was held, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment *made by A. was declared valid by the 6 G. 4, c. 16, s. 82; and in order to give full effect to that enactment, A. must at least have a lien on the books, in respect of which he had made the payment, until the assignees tendered him the sum paid. *Cash v. Young*, 2 B. & C. 413, is a decision to the same effect on the statute 1 Jac. 1, c. 15, s. 14, which protected payments made in the ordinary course of trade.

Spankie. The *bona fides* of the transfer will not entitle the defendant to retain these horses, or protect the transaction, unless it can be said to amount to a payment to a creditor of the bankrupt on the day of the transfer, within the meaning of the eighty-second section of 6 G. 4, c. 16, which enacts, "that all payments, really and *bonâ fide* made by any bankrupt, or by any person in his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." Here, were two separate transactions: the acceptance of the bill for the accommodation of the bankrupt; and subsequently the transfer of the horses by the bankrupt to the acceptor, by way of security for the payment of the bill, for which he had made himself responsible. At the time of the acceptance, and transfer of the bill to Bamford, the transfer of the horses to the defendant had never been thought of. It is impossible, therefore, to say that the bill was given to the creditor as payment for the horses. It was given as an accommodation to the bankrupt; and the horses were afterwards made over to the acceptor in return for that accommodation. It would be a violent application of the *εσπονος εσπονος* to call this a sale. In *Hill v. *Farnell*, the transaction was at least *uno flatu*, though even there it was doubted [*620] whether the assignees had not the right to rescind it; and in *Cash v. Young*, there was a payment to a creditor. But in *Bishop v. Crawshay*, 3 B. & C. 415, where A., a merchant in London, ordered goods to be made by B., a manufacturer in the country; the goods were made to order, but, before they were forwarded to A., B. committed an act of bankruptcy, and afterwards shipped the goods, having previously, but after the act of bankruptcy, drawn upon A. a bill of exchange for a larger sum than the price of the goods ordered, which bill A. accepted, not then knowing that B. had committed an act of bankruptcy: the goods having afterwards come to the possession of A., it was held that the assignees were entitled to recover them, because the property in them remained in the bankrupt, both at the time when the act of bankruptcy was committed, and when the bill was accepted by A., and therefore this was not a payment protected by the 1 Jac. 1, c. 15, s. 14, because A. was not a debtor of B. at the time when the acceptance was given.

Cur. adv. vult.

TINDAL, C. J. One question in this case, and the only one upon which it is necessary to give a decision, is, whether the transaction between the bankrupt and the defendant, under which the delivery of the horses was made, falls within and is protected by the eighty-second section of the statute 6 G. 4, c. 16.

The defendant, at the request of the bankrupt, after the committing of a secret act of bankruptcy, accepts a bill of exchange for 98*l.* for the bankrupt's accommodation, which bill is paid to Bamford, a creditor of the bankrupt, who carries the same way.

*In the course of the same evening, but after that transaction is completed, the bankrupt and the defendant have further conversation as [*621] to the security to be given to the defendant, and it is agreed between them that the bankrupt shall sell to the defendant four of his horses, being the same horses for which this action of trover is brought, for 70*l.*, being part of the amount of the acceptance. The horses are at a subsequent time put into the possession of the defendant, and the bill for 98*l.* is paid by the defendant when it arrives at maturity.

These are the facts of the case. It is contended by the defendant, that the transaction is protected by the eighty-second section of the statute, on the authority of the two cases to which he has referred. It is to be observed, that in each of these cases, the transaction was that of a direct distinct sale and payment of the price; and the Court of King's Bench held the earlier case to be within the protection of the 1 Jac. 1, c. 15, and the latter within the eighty-second section of the recent act, not upon the ground that the property passed by the sale, but that the payment could not be deemed a valid payment for any beneficial purpose to the party paying, unless he was allowed to retain the goods so long as he was kept out of the money. In fact, no one of the bankrupt acts protects a sale by the bankrupt, as a sale, but merely the payment of the price.

But this case appears to us not to be so much a sale of goods with payment of the price, as a sale of goods with an agreement to set off the price against a liability on the part of the bankrupt.

It would be dangerous to extend the application of the decided cases so as to give effect to a set-off in consequence of a subsequent sale.

This was an acceptance lent by the defendant for a larger sum, without any reference to the sale of the horses, which was not then thought of; and whether +622] at a short interval before, or at a long one, can make no difference in the principle of the decision. Treating, therefore, the acceptance by the defendant, which was afterwards honoured, as an actual advance of money, which is the most favourable way of considering it for the defendant, the transaction amounts to no more than a set-off of the price of the horses against a by-gone debt; which set-off is agreed upon after a secret act of bankruptcy: and we do not think this can, in any point of view, be considered a payment within the eighty-second section of the act.

The case seems to us to come nearer that of *Bishop v. Crawshay*, cited by the plaintiffs, than that of *Hill v. Farnell*.

The consequence is, that a new trial must be had.

Rule absolute.

REGULA GENERALIS.

IT IS ORDERED by the Court, that, in future, in Hilary and Trinity terms, no motion for a new trial shall be heard, unless such motion be actually made within the first four days of each of the said terms.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

J. B. BOSANQUET.

END OF EASTER TERM.

C A S E S
 ARGUED AND DETERMINED
 IN THE
 COURT OF COMMON PLEAS,
 AND
 OTHER COURTS,
 IN

Trinity Term,

IN THE ELEVENTH YEAR OF THE REIGN OF GEORGE IV.

LAFITTE v. SLATTER. June 12.

The drawer of a dishonoured bill is entitled to notice of dishonour, although he knows the bill will not be paid by the acceptor, provided he has reason to expect it will be paid by any other person, or has a remedy over against such person.

ACTION by endorsee on a bill of exchange for 315*l.* 16*s.* 10*d.*, drawn by defendant February 18, 1829, at four months after date, and accepted by Henry Tebbs, payable at Messrs. Barnetts and Co., Lombard Street.

About a fortnight after the bill became due, the defendant received a letter from the plaintiff's attorney demanding payment, but no express notice of dishonour was ever given, and the plaintiff sought to supply the omission by showing that the defendant had no effects in the hands of Tebbs, and knew the bill would not be paid by him: as to which, the evidence was, a conversation between the defendant and Tebbs in May 1829, when Tebbs said that he had received no *value for the bill; that he had not the means of taking it up; and that [424] he was a ruined man, in consequence of the conduct of one Rose, who had got him to accept the bill. The defendant expressed surprise, saying Rose had told him that Tebbs was indebted to him, Rose. Tebbs denied the existence of any such debt: but it was explained to him that the defendant was not the person to pay the bill, he having reason to expect that Rose would provide funds for the payment, and that at all events, if Rose did not pay, the defendant would have a remedy over against Rose.

Tebbs and the defendant had never had any transactions together, but it came out that Rose owed the defendant 1000*l.*

A verdict having been found for the plaintiff, at the trial before Tindal, C. J., London sittings after Michaelmas term last, with leave for the defendant to move to set it aside and enter a nonsuit,

Wilde, Serjt., moved accordingly. The drawer of a bill is *prima facie* entitled to notice of dishonour; the party who sues must establish the ground of dispensation, if any exist, and there is seldom such a coincidence of circumstances as to admit of such dispensation. It must be shown, that neither when

the bill was drawn, nor when it became due, had the acceptor any assets in respect of which there was a reasonable expectation the bill would be paid; it should also be shown, that neither among the parties to the bill, nor elsewhere, were there any one against whom the drawer had any expectation of reimbursing himself; for if he have any such expectation, he is entitled to notice, in order that he may enforce his claim without delay. The mere circumstance that the party sued knew the bill would not be paid by the acceptor, does not dispense *625] with the necessity of giving him notice of dishonour. *Staples v. Okines*, 1 Esp. 332, *Clegg v. Cotton*, 3 B. & P. 289, *Whitfield v. Savage*, 2 B. & P. 277, *Esdaile v. Sowerby*, 11 East, 117; where Lord Ellenborough said, "As to knowledge of the dishonour by the person to be charged on the bill, being equivalent to due notice of it given to him by the holder, the case of *Nicholson v. Gouthit* is so decisive an authority against that doctrine, that we cannot enter again into the discussion of it;" and Bayley, J., "It was said in *Tindal v. Brown*, 1 T. R. 167, that notice means something more than knowledge." In *Cory v. Scott*, 3 B. & A. 622, *Abbott, C. J.*, said, "That decision, which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law, instead of adhering to a plain and intelligible rule. As I have always thought that it would have been better never to have considered knowledge as equivalent to notice, I cannot consent to carry the law one step further."

Nor will the known insolvency or bankruptcy of the acceptor dispense with notice. *Russell v. Langstaffe*, Dougl. 515, *Warrington v. Furber*, 8 East, 242, *Nicholson v. Gouthit*, 2 H. Bl. 610, *Rohde v. Proctor*, 4 B. & C. 517, *Smith v. Beckett*, 13 East, 187, *Thackray v. Blackett*, 3 Campb. 164. If there be any expectation that the bill will be paid, notice cannot be dispensed with. *Orr v. Maginnis*, 7 East, 358, *Legge v. Thorpe*, 12 East, 171, *Rucker v. Hiller*, 3 Campb. 217, 16 East, 43. And if the party sued have any remedy over, though not on the bill, he is entitled to notice. *Brown v. Maffey*, 15 East, 216.

Taddy, Serjt., showed cause, and relied on *Bickerdike v. Bollman*, 1 T. R. *626] 405, where it was established that a drawer is "not entitled to notice where he has no effects in the hands of the drawee, because he cannot be injured by want of notice: and the Court will not look beyond the parties to the bill. The circumstance, therefore, of the drawer expecting the bill to be paid by a stranger, or having any remedy over against him, will not of itself entitle him to notice. In *Brown v. Maffey* and *Cory v. Scott*, the expectation of payment and the remedy over were confined to parties to the bill.

Taddy then contended, that the letter of the plaintiff's attorney was equivalent to notice of dishonour; but the Court decided at once that it was clearly insufficient.

Wilde in support of his rule, (*Russell*, Serjt., was with him,) observed, that the decision in *Bickerdike v. Bollman* had always been disapproved of, and could not be supported except under circumstances precisely the same. It was distinguishable from the present case in the circumstance that the drawer had no remedy over.

TINDAL, C. J. *Bickerdike v. Bollman* has always been considered as an excepted case; and perhaps it applies only where the bill has been accepted for the accommodation of the drawer, who, in such case, if he knew that the acceptor had no assets, can incur no damage from want of notice. The principle of that case, therefore, is not to be extended. And in many other decisions, particularly in *Rucker v. Hiller*, 16 East, 43, it has been laid down, that the drawer is entitled to notice if he have reasonable ground to expect the bill will be paid, although he have no assets in the acceptor's hands.

The question, therefore, is, whether as the evidence stands in this case, the *627] drawer had reasonable grounds "to expect that the acceptor or some one else would pay the bill, although the drawer had no assets in the acceptor's hands; and when we find the acceptor saying he had not the means of paying the bill in consequence of *Rose's* misconduct, it seems to have been un-

derstood that Rose was the person who was to take up the bill. And, as Rose owed the drawer 1000*l.*, he had occasion to watch the proceedings of Rose as well as of the acceptor, and so was exposed to injury by the want of notice.

PARK, J., was absent at chambers, but his concurrence in the judgment was stated by the Chief Justice.

BOSANQUET, J.(a) The general rule is, that the drawer is entitled to notice of the dishonour of the bill, and *Bickerdike v. Bollman* is an excepted case, the principle of which is not to be extended. In the case of an accommodation bill, the drawer has no reason to expect the bill will be paid unless he pays it himself; but in other cases it is established, that the drawer is entitled to notice if he have a reasonable expectation that the bill will be paid. It is manifest here that the drawer lent his name in the expectation that Rose would provide for the bill; he was, therefore, entitled to notice of its dishonour. Rule absolute.

(a) Gaselee, J., delivered no opinion, not having been present during the argument on the part of the plaintiff.

*HAMILTON v. JONES, PITT, and Another. June 12. [*628]

The sheriff may, even after he is in contempt for not bringing in the body, put in bail to surrender the defendant without the consent of the defendant, and notwithstanding the original bail-piece is still on the file.

THE defendants Jones and Pitt having been arrested in this cause, and the bail of which they had given notice not having justified, the sheriff was ruled to bring in the body, and the rule having expired, an attachment issued against him; when the old bail-piece being still on the file, the sheriff, without the knowledge of the defendants, put in fresh bail for the purpose of rendering, and then rendered the defendants.

Pitt, one of the defendants, now objected in person to this course as irregular, contending, that as long as the old bail-piece remained on the file, the original bail were alone competent to render the defendants, for which he referred to *Sharp v. Sheriff*, 7 T. R. 226, and contended, on the authority of *Rex v. Sheriff of Essex*, 5 T. R. 633, and many other cases, that after the attachment had issued, the sheriff could not purge his contempt except with the consent of the defendants. Park, J., having referred to *Evans v. Swete*, 2 Bingh. 271, the defendant Pitt admitted, that what he complained of had prevailed in practice, but urged that the practice was erroneous, and at variance with all the other cases.

TINDAL, C. J. No case has been made out for the interference of the Court, on this ground. The defendant complains that he has been rendered to prison by persons who are strangers to him; but it appears by his affidavit, that those persons were bail put in by the sheriff for the purpose of rendering: the question, *therefore, is, whether the practice of this Court allows the sheriff [*629] to put in bail to protect himself, where the bail put in by the defendant have omitted to justify. There are several cases which establish that he has the power of doing so, and in particular *Haggett v. Argent*, 7 Taunt. 47. Such has been the invariable practice, and it must be immaterial to the defendant whether he is surrendered by one set of bail or the other.

As to the objection, that the sheriff cannot do this after he is in contempt, however it might be urged on the part of the plaintiff, if he waives it, it is not open to the defendant to raise such an objection; and I see no reason why the sheriff, as a public officer, should not have every indulgence to enable him to make the render.

The defendant took nothing on this ground, but having objected that the sheriff's officer had charged him 1*l.* 8*s.* for the arrest, a rule nisi was granted to refer it to the prothonotary, to ascertain what the officer was entitled to.

*630]

*SHARP v. SHARP. June 12.

Testator, after bequeathing pecuniary legacies to his children, devised to his widow the whole of his remaining property in the Bank of England or otherwise, and also a freehold house in S., a freehold estate in R., a copyhold estate in B., and a leasehold estate in A., with all right and title to the same: Held, that the widow took a fee in the freehold, and a customary fee in the copyhold.

By order of the Master of the Rolls, the following case was submitted for the opinion of this Court:—

Thomas Sharp, late of Silver street, in the parish of St. Botolph, in the town of Cambridge, tailor, deceased, the late husband of the defendant, being in his lifetime, and at the time of his death, seised in fee-simple of, or well entitled to considerable real estates, made his will, bearing date the 30th of October, 1822; and thereby, after directing that his just debts, funeral expenses, and the charges of proving his will, should be paid and satisfied by his executrix and executors thereafter named, and after giving several pecuniary legacies for the benefit of his children therein mentioned, proceeded in the words following, that is to say:—"I give and bequeath to my dear wife Emilia Sharp, the whole of my remaining property in the Bank of England or otherwise; and also a freehold house which I now live in, situated in Silver street, in the parish of St. Botolph, in the town of Cambridge; also a freehold estate in Regent street, in the parish of St. Andrew, in the town of Cambridge; also about sixty-one acres of freehold land, with house and barns thereon, situated in the fens and in the parish of Bottisham, in the county of Cambridge; also about sixteen acres of fen land, freehold, with a house and barn thereon, adjoining the above sixty-one acres of land in Bottisham fen; also about twelve acres of freehold fen land in the parish of Stretham, in the Isle of Ely, in the county of Cam-
*631] bridge; also a copyhold estate of the manor of Ely Barton, and now occupied by Mr. Benjamin Pope, of Stretham, and is the estate I lately purchased of Mr. Aswell Peacock; also a leasehold estate purchased of the assignees of Mr. D. Blacklee, and which is in the parish of St. Andrew the Less, otherwise called Barnwell, in the town of Cambridge, with all right and title to the same. I also leave my wife all moneys that should be in my possession at my decease, and all moneys due to me on all mortgages, notes, or note of hand, with all interest due thereon; also all my household furniture, plate, linen, china, and glass, and all other effects. I also leave my dear wife Emilia Sharp, all my share of the property due to me out of the business, as carried on in the firm of Messrs. William Sharp, Thomas Sharp, and Frederick Sharp only; the property so belonging to my share consists of estates, freehold and leasehold messuages, bonds, notes of hand, bills and drafts, cash and moneys in the banker's hands, and outstanding debts, and the stock in trade."

The testator died on the 6th March, 1823, without revoking or altering his will, leaving the defendant, his widow, and the plaintiff, his eldest son and heir at law, and also his heir by the custom of the manor of Ely Barton, him surviving.

The estates devised by the said will consisted of the several freehold and copyhold messuages, lands, tenements, and hereditaments in the will particularly described, and the question for the opinion of the Court, was,

Whether the defendant, Emilia Sharp, was entitled to an estate for her life, or to an estate in fee simple in all or any, and which of the messuages, lands, tenements, and hereditaments devised by the said will of her late husband Thomas Sharp, the testator.

*632] *The case was argued in Easter term.

Scriven, Serjt., for the plaintiff. The defendant took only an estate for life. In a devise of real property, where there are no words of inheritance, and no necessary implication from the language of the will to give a larger estate, the devisee takes only a life interest. *Loveacres v. Blight*, Cowp. 355, *Bowes v. Blackett*, Cowp. 240

There is nothing from which such an implication can arise in the present will unless it be the word *estate*. But that word alone will not convey a fee. There must be other expressions indicating the testator's intention; *Denn v. Gaskin*, Cowp. 657, *Frogmorton v. Wright*, 3 Wils. 414, *Goodright d. Drewry v. Barron*, 11 East, 220, *Wilkinson v. Merryland*, cited in 1 Comyns, 253, 339, *Piereson v. Vickers*, 5 East, 547; or a charge of debts on the freehold, as in *Denn v. Mellor*, 5 T. R. 558. The heir is not to be disinherited unless the intention be clear. *Right v. Sidebotham*, Dougl. 759, *Doe d. Pulteney v. Cavan*, 5 T. R. 567, *Doe v. Wright*, 8 T. R. 64, *Roe v. Yeud*, 2 N. R. 214, *Timewell v. Perkins*, 2 Atk. 102. The word *estate*, as used in this will, is designative of locality only, not of interest; and the words "with all right and title to the same" indicate only an intention that the enjoyment should be uninterrupted. Those words, too, apply only to the estate in *Barnwell*.

Adams, Serjt., contrd. The defendant took a fee in all the property, for the testator's intention to devise a fee to her is sufficiently apparent in the circumstance of his leaving pecuniary bequests to all his children, and *then giving to his wife "the whole of his remaining property," concluding [*633 the catalogue of it with the words "and all right and title to the same."

In *Andrew v. Southouse*, 5 T. R. 292, by a devise of all testator's "interest" in certain estates, a fee was holden to pass, and Lord Kenyon said, "For nearly half a century it has been the wish of the courts to give effect to the intention of the devisor as far as they can. It has frequently been observed that in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the devisor; and Lord Mansfield often said that it appeared to him that persons in general who made their own wills thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest." And in *Cole v. Rawlinson*, 3 Br. P. C. 7, a fee was holden to pass by a devise of all right and title to the property described. In *Holdfast v. Marten*, 1 T. R. 411, it was decided that the word *estates* will pass a fee unless it be restrained by other expressions in the will. In *Fletcher v. Smiton*, 2 T. R. 656, it was holden that the word *estates* in a will would carry the fee, unless coupled with other words which show a different intention; and in *Doe v. Woodhouse*, 4 T. R. 89, that the words "the remainder of the profits out of my whole estate," after certain specific devises, carry a fee.

Scriven. In *Andrew v. Southouse* the testator charged with an annuity the land he had devised; it was necessary, therefore, that the devisee should take a fee to effect all the testator's intentions. In *Cole v. Rawlinson* *the in- [*634 troductory parts of the will gave a key to the testator's meaning.

Our. adv. vult.

The following certificate was afterwards sent:—

We have heard this case argued by counsel, and have considered the same; and we are of opinion that Emilia Sharp is entitled to an estate in fee simple in all the freehold messuages, lands, tenements, and hereditaments devised by the said will of her late husband Thomas Sharp, the testator; and to an estate in fee, according to the custom of the manor of Ely Barton, in the copyhold estate devised by the said will.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

ROWE v. SOFTLY. June 15.

When money is paid into the hands of the sheriff in lieu of bail, the defendant has, under 7 & 8 G. 4, c. 71, till the day for *perfecting* special bail for giving notice of his intention that the money shall remain in court to abide the event of the suit.

THE defendant was arrested on the 8th of May, when he placed in the sheriffs' hands, in lieu of bail, 21*l.*, the debt sought to be recovered, and 10*l.* for costs, pursuant to 7 & 8 G. 4, c. 71, s. 2; which sums were afterwards paid into the hands of the prothonotary.

On the 14th, the defendant's time for putting in bail expired, and none appeared. On the 17th, the plaintiff obtained a rule for taking out of court the two sums in the hands of the prothonotary, no bail having been put in; and,

On the same day, before which the defendant was not compellable to perfect his bail, he gave the plaintiff notice of his intention to allow the two sums, and *635] 10*l.* *more which he added, to remain in court pursuant to the statute to abide the event of the suit, and that he had entered a common appearance.

Adams, Serjt., showed cause against the rule for taking the money out of Court, and contended, that as the defendant himself, if he had perfected special bail, could not have taken the money out till the bail were perfected, the plaintiff could not claim it at an earlier period; the plaintiff, therefore, was not in a situation to make the present motion till the 18th, and the defendant had the right of giving notice of his intention till the expiration of the 17th. The act was remedial; intended to extend the provisions of 43 G. 3, c. 46; and ought to receive a liberal construction. Besides, it contained no provision enabling the plaintiff to take the money out of Court before judgment.

Andrews, Serjt., in support of the rule, insisted that the plaintiff was entitled to the money, upon the defendant's failure to put in bail; and that the defendant was not entitled to postpone notice of his intention till the day for perfecting bail.

The Court took time to inquire into the practice of the Court of King's Bench; and now

TINDAL, C. J., pronounced judgment. In this cause the plaintiff seeks to take out of Court a sum of 21*l.*, being the debt sought to be recovered, and 10*l.* beyond, paid by the defendant into the hands of the sheriff in lieu of his giving bail to the sheriff upon his arrest.

The question arises on the statute 7 & 8 G. 4, c. 71, s. 2, which extends the provisions of the 43 G. 3, c. 46, and enacts, "that it shall be lawful for the *636] defendant, instead of putting in and perfecting special bail in the *action according to the course and practice of the court, to allow the sum deposited with the sheriff, and by him paid into court, together with the additional sum of 10*l.* to be paid into court by such defendant as a further security for the costs of the action, to remain in the court to abide the event of the suit:"—"and thereupon the defendant may, and is required to enter a common appearance, or file common bail in the action within such time as he would have been required to have put in and perfected special bail in the action according to the course of the court." And the point to be determined is, whether on the day for *perfecting* special bail the defendant was in time for giving notice of his intention that the sums paid into the hands of the sheriff should remain in court to abide the event of the cause, or whether he ought to have given that notice on or before the day for *putting in* the bail.

The act is remedial; it extends the provisions of the 43 G. 3, c. 46, which had been found beneficial in its operation, and the words used, "Within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the court," comprehend the whole time till the last day for perfecting special bail. And we put this construction on it the rather, because it has no tendency to delay the plaintiff, for he could not declare in chief till the time for perfecting special bail had expired. It has

been contended that there is no provision in the act which authorizes the plaintiff to take the money out of court before the suit is concluded. At all events the defendant had till the end of the 17th to perfect special bail; and as he gave notice on that day of his intention that the money should remain in court to abide the event of the suit, he is entitled to proceed with his defence.

Rule discharged.

***SMITH and Others, Assignees of COOKE, v. CAMPBELL, [*637
SHOULS, and COOPER. June 15.**

Where there are several defendants who obtain a verdict generally, the costs of all must be taxed at the same time, although they defend separately.

THIS was an action of *assumpsit*. Cooper defended separately. The plaintiffs countermanded notice of trial: before they gave a second notice, Cooper became insolvent, and the two first defendants only appeared to defend the cause at the trial.

A verdict was given for the defendants generally, and costs were taxed for the two defendants who appeared at the trial, Cooper's attorney declaring he would not be concerned for him. Judgment was signed, and the costs paid.

Wilde, Serjt., obtained a rule *nisi* for the prothonotary to review his taxation, and allow Cooper his costs.

Taddy, Serjt., who showed cause, contended that judgment having been once signed against the plaintiffs, and the costs having been paid, they ought not to be harassed again. The defendants must arrange between themselves the division of what had been paid.

Wilde. The third defendant ought not to lose his costs because he happened not to be present when the costs were taxed; especially as judgment was signed in order to prevent any delay to the other defendants.

TINDAL, C. J. The defendant Cooper had the opportunity of obtaining his costs, if he had chosen to exert himself, when the judgment was signed and the costs paid to his co-defendants; but he has no right to prejudice the plaintiffs by a second demand. The ground of complaint, if anywhere, [*638 is by Cooper against his own attorney.

Rule discharged.

WELSH v. ROSE. June 16.

Plaintiff being about to take an apartment of defendant's tenant, defendant promised plaintiff never to trouble him or his property so long as he paid the tenant the rent of the apartment. The plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the defendant, who had received no notice of the tender, distrained plaintiff's goods for rent due from the tenant to defendant: Held, that his right to distrain was not barred.

TRESPASS for breaking and entering the plaintiff's rooms, &c., and taking his goods.

Plea. That one John Barrett for a long time, to wit, for the space of one year next before and on the 25th day of November, 1829, and from thence until and at the said times when, &c., held and enjoyed, amongst other premises, the said rooms and apartments, pig-stye and yard, in which, &c., as tenant thereof to the said defendant, under and by virtue of a certain demise thereof theretofore made, at and under a yearly rent of 18*l.* payable monthly, that is to say, on the 25th day of each and every month in the year, by even and equal portions: that on the said 25th day of November, in the year aforesaid, a large sum of money, to wit, the sum of 10*l.* 10*s.* of the rent aforesaid, for seven

months ending on the said 25th day of November, became and was due and payable from the said J. Barrett to the said defendant, and at the said times, when, &c., was in arrear and unpaid: wherefore the said defendant on the said day when, &c., did enter into and upon the said rooms, apartments, pig-sty, and yard, in which, &c., and took, &c.

*639] *Replication. That before and at the time of the application to the defendant, and his giving the assurance and making the promise hereinafter next mentioned, the said J. Barrett held and enjoyed certain premises, with the appurtenances, as tenant thereof to the defendant; and that the said rooms and apartments, and yard, in which, &c., were part and parcel of the said premises, so held and enjoyed by the said J. Barrett as tenant thereof to the defendant: that the plaintiff, being minded and desirous to take and hire the said rooms and apartments, and yard, in which, &c., of the said J. Barrett, and to become tenant thereof to the said J. Barrett, at and under a certain rent theretofore payable by the plaintiff to the said J. Barrett for the same, but being apprehensive that the said J. Barrett then was or might thereafter become indebted to the defendant for the rent of the whole of the premises with the appurtenances,—whereof the said rooms and apartments, and yard, in which, &c., and which the plaintiff was so minded and desirous to hire and take of the said J. Barrett, were parts and parcel as aforesaid,—and that if the said J. Barrett was or should become indebted to the defendant for rent as aforesaid, the cattle, goods, and chattels of him, the plaintiff, which he might bring into and upon the rooms and apartments, and yard, in which, &c., if he hired and took the same of the said J. Barrett, might be seized and taken by the defendant as a distress for any rent which might be or might become due and in arrear from the said J. Barrett to the defendant for rent of the whole of the premises so held by the said J. Barrett as tenant thereof to the defendant as aforesaid, and being unwilling to expose such his cattle, goods, and chattels to be taken as a distress for such rent as last aforesaid, or to become tenant to the said J. Barrett, without being assured and satisfied that such his cattle, goods, and chattels

*640] would not be *taken as a distress for such rent as last aforesaid, before he took and hired the said rooms and apartments, and yard, in which, &c., and before the said time, when, &c., to wit, on the 25th day of May, 1829, to wit, at, &c., applied to the defendant as the landlord of the said J. Barrett of the whole of the said premises whereof the said rooms and apartments, and yard, in which, &c., were parts and parcel as aforesaid, and informed him that he was minded and desirous to hire and take the said rooms and apartments, and yard, in which, &c., of the said J. Barrett, but was unwilling to do so if he were liable, or his cattle, goods, and chattels could be taken as a distress for the rent of the said J. Barrett to the defendant; whereupon the defendant then and there, and before he, the plaintiff, took or hired the said rooms and apartments, and yard, of the said J. Barrett, and long before the said time, when, &c., to wit, on, &c., at, &c., assured and promised the plaintiff that as long as he, the plaintiff, paid to the said J. Barrett the rent which should become due from him to the said J. Barrett for the said rooms and apartments, and yard, which he was so minded and desirous to hire and take of the said J. Barrett as aforesaid, and which were and are the rooms and apartments, and yard, in which, &c., he the defendant would never trouble the plaintiff or his property: that he, the plaintiff, relying on and confiding in the said assurance and promise of the defendant so with him made as aforesaid, did afterwards, and long before the said time, when, &c., to wit, on, &c., at, &c., hire and take the said rooms and apartments, and yard, in which, &c., so being parts and parcel as aforesaid, of the said J. Barrett, and became and at the said time, when, &c., was tenant to the said J. Barrett of the same, and after he so became and whilst he was tenant to the said J. Barrett of the same, and before the said time, when, &c., to wit, on the day and year last aforesaid, with the *consent of the said J. Barrett, erected and made the said

*641] pig-sty in the said yard, in which, &c.: that he, further relying on the said assurance and promises of the defendant, afterwards, and long before the

said time, when, &c., to wit, on, &c., brought the said cattle, goods, and chattels in the declaration mentioned, being his proper cattle, goods, and chattels, into and upon the said rooms and apartments, and yard, in which, &c. : that before the said time, when, &c., and before the making the tender hereinafter mentioned, he had paid to the said J. Barrett all the rent which had become due and payable from him to the said J. Barrett for or in respect of the said rooms and apartments, and yard, in which, &c., before the said time, when, &c., except a small sum of money, to wit, the sum of 2*l.* 15*s.* of lawful money of Great Britain; and that always from the time the said sum of 2*l.* 15*s.* of rent aforesaid, or any part thereof, became and was due and payable from and by the plaintiff to the said J. Barrett, hitherto, he was and still is ready and willing to have paid and to pay the same to the said J. Barrett; and that he, before the said time, when, &c., to wit, on, &c., at, &c., was ready and willing to have paid, and then and there tendered to pay, to the said J. Barrett the said sum of 2*l.* 15*s.* as aforesaid, to receive which of the plaintiff the said J. Barrett wholly refused: and further, that at the said time, when, &c., there was not any other or more rent due or payable from him, the plaintiff, to the said J. Barrett than the said sum of 2*l.* 15*s.* so tendered and offered, and so refused as aforesaid: that he was and remained in the quiet and peaceable possession, use, occupation, and enjoyment of the said rooms and apartments, pig-sty and yard, in which, &c., as tenant thereof to the said J. Barrett, and that the said cattle, goods, and chattels in the declaration mentioned, being the proper cattle, goods, and chattels of him, the plaintiff, were in and *upon the said rooms and apartments, pig-sty and yard, in which, &c., until the defendant at the said [642] time, when, &c., of his own wrong, and in breach of his said assurance and promise, did and committed the trespasses in the declaration mentioned, and in and by his said last plea attempted to be justified, in manner and form as the plaintiff above thereof complained against him.

Demurrer and joinder.

E. Lawes, Serjt., in support of the demurrer. The matter replied does not amount to a release of the right to distrain. It is not pleaded as a contract, and does not appear to be such, there being an entire absence of consideration. But, at all events, it is a conditional contract, and there is no averment that the condition has been observed. The engagement was not to trouble the plaintiff if Barrett's rent were regularly paid, and to enable the plaintiff to sue, it ought to appear that the rent has been regularly paid. It is not alleged even that the defendant had notice of the tender.

Taddy, Serjt., *contrd.* The statement in the replication amounts to a license to plaintiff to put his goods on the premises without being subject to distress; and in *Webb v. Paternoster*, Palm. 71, confirmed by *Taylor v. Waters*, 7 Taunt. 374, it was held, that a license to stack hay upon land, was irrevocable, provided the license were for a time certain. The time here is the duration of Barrett's term. As to the payment of the rent, the performance of that condition is shown in substance, and the license being executed, the consideration for it is immaterial.

TINDAL, C. J. In the case cited, the argument turned on a license granted by one who was competent to *grant it. But there was no license here [643] from the defendant, because he had parted with the possession of the premises to Barrett. The matter replied, therefore, is no more than a promise not to trouble the plaintiff as long as he paid to Barrett the rent which should become due from the plaintiff to Barrett. Without entering into the question, whether or not there was a consideration to support this promise, it is enough to observe here, that the condition of the promise has not been observed. "So long as he paid to Barrett the rent which should become due, the defendant would never trouble the plaintiff or his property."

Here it is stated that the rent was only paid to a certain period, and that some remains due. As to the tender which is alleged, it does not appear that

the landlord had any notice of it, and he is not to be deprived of his remedy by distress, by a proceeding of which he had no notice.

PARK, J. This was a mere conditional undertaking, and unless performance of the condition be shown, there is no relinquishment of the defendant's right of distress.

GASELEE, J. Without entering into the effect of the agreement, it is sufficient to say, that the condition on which it hinged has not been performed, and that, therefore, the plaintiff can claim no advantage under it.

BOSANQUET, J. I am of the same opinion. *Webb v. Paternoster* does not apply, because the license there was given by a party in possession, and competent to give it. Here the supposed license was not given till the defendant had parted with the possession of the premises. Judgment for the defendant.

*644] •IN THE EXCHEQUER CHAMBER.

EASTERBY *v.* SAMPSON and Another. *June 18.*

Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions, upon a waste near the mines, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

The lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors and waste lands; and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines, *Adendum* the said demised premises, with the appurtenances, for twenty-one years. The lessor afterwards granted his reversion of and in the said demised premises, with the appurtenances, to G. B., who, by will, devised the same to the plaintiffs: Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it.

COVENANT. The declaration recited that Sir C. Turner, before and at the time of making the indenture of demise thereafter mentioned, was seised in fee of and in one undivided third part of the tenements, with the appurtenances thereafter mentioned to have been demised; and the said Sir C. T. being so seised, &c. &c., by a certain indenture of demise made between Sir C. T. of the one part, and A. S., J. S., G. D., the defendant, W. H., and F. H. of the other part, (reciting that Sir C. T. did, on, &c., agree with the said A. S., &c., to demise to them for twenty-one years the undivided third part of Sir C. T. of and in the mines, minerals, and quarries thereafter described, at and under the yearly rent of, &c., and under and subject to the covenants and agreements therein-after contained; that the said A. S., J. S., G. D., the defendant, W. H., and F. H. did, in pursuance of the said agreement between them and the said Sir C. T., *645] enter upon and take possession *of the said third part and premises on the 1st of January, 1800; that A. S., J. S., G. D., the defendant, W. H., and F. H., had since the said 1st of January, 1800, with the permission of Sir C. T., and of W. S., Esq., and C. F. F., Esq., the owners of the other two-third parts of the said mines and premises, taken down a smelting mill belonging to them, situate upon a part of a tract of waste ground within the manor of Arkindale thereafter mentioned, called Old Moulds, and some other contiguous buildings; and the said A. S., J. S., G. D., the defendant, W. H., and F. H., did engage to erect, at their own expense, a smelting mill of larger dimensions, with several adjoining buildings upon another part of the said tract of waste ground; which mill, with the water wheel belonging thereto, and the said other buildings, it had been agreed should belong to and be the property of the said Sir C. T., W. S., and C. F. F., in lieu of the said mill and buildings

so taken down;) in consideration of the rent therein reserved, and of the covenants and agreements thereafter contained, did demise to A. S., J. S., G. D., the defendant, W. H., and F. H., their executors, &c., all that undivided third part or share of the said Sir C. T. of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or which should, during the continuance of that demise, be opened, known, found, discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and unenclosed lands situate, lying, or being in, within, or parcel of the several manors or lordships of Arkendale, New Forest, and Hope, in the county of York, or any of them; and also of and in all mines and seams of coal, and quarries of stone, in or within the said manors or lordships, or reputed manors or *lordships, or any of them, or any part thereof respectively; and also of and in all smelting mills, stamping mills, refining mills, [*646 store-houses, work-houses, smiths' forges, sheds, hovels, and buildings standing or being in or upon any part of the said moors, commons, or wastes which then were, or at any time theretofore had been commonly used or employed for mining purposes, together with full and free liberty to A. S., J. S., G. D., the defendant, W. H., and F. H., their executors, &c., during the continuance of the demise, to dig, sink, drive, work, and make grooves, &c., and to use all other lawful ways and means whatsoever, (hushing, in any lands or grounds lying within the said manors, or any of them, and which, on the day of the date of the said indenture, were enclosed, only excepted, unless the same should be done with the license and consent in writing of the lords of the said manors for the time being,) for the searching for, finding, discovering, working, and getting of the lead, tin, and copper ore, and coal, and all other minerals, and for working the said quarries, and burning lime in or upon all or any of the moors, commons, wastes, and unenclosed lands, situate, &c.; and with full power (but so far only as the said Sir C. could lawfully grant the same, and not otherwise) for A. S., J. S., G. D., the defendant, W. H., and F. H., their executors, &c., to have heap-room, &c., upon the said moors, commons, wastes, and unenclosed lands, for laying, placing, &c., the ores, &c., wrought and dug out of the mines and quarries, of which one-third part was thereinbefore demised, and with full power (so far as, &c.) to turn and to dig watercourses, &c., to do all other things (hushing only excepted) as might be necessary; and also full power and authority to erect or build in or upon any part of the said moors, commons, wastes, and lands, then unenclosed, all such smelting mills, stamping *mills, [*647 &c., as might be requisite for effectually working the said mines. [*Habendum* to A. S., J. S., G. D., the defendant, and J. H., and F. H., for nineteen years. And the defendant did, in and by the said indenture, for himself and his heirs, &c., covenant, promise, and agree to and with the said Sir C., his heirs, &c., that the said A. S., J. S., G. D. the defendant, W. H., and F. H., their executors, administrators, and assigns, should and would, during the continuance of the said demise, maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the waterwheel to the same belonging, and the bobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings already erected, and which, during the continuance of that demise, should be erected contiguous or near to the said mill, in good and sufficient condition and repair, and should at the expiration, or other sooner determination, of the said term, deliver up the same in good and sufficient condition and repair, and also deliver up in good and sufficient order and repair all such forges, &c., as should within two years of the end of the term by used by the leasees for mining purposes. The declaration then stated a grant of the reversion of Sir C. T. of and in the said demised premises, with the appurtenances, to G. B.; that G. B. devised the same to the plaintiff, and died seised of the said reversion, without altering his will. Breach, first, that neither defendant nor A. S., &c. did at any time during the demise erect or build at their own expense, or otherwise, a smelting mill of larger dimensions than the mill taken down, as in the

indenture of demise mentioned. Secondly, that the defendant and his co-lessees did not keep such smelting mill, &c., in good repair. Thirdly, that they did not so deliver it up at the expiration of the term. Demurrer and joinder. Judgment *for the plaintiff in the Court below; and error thereon.

*648] *Broderick* for the defendant below.

There is no covenant by the defendant below to erect a smelting mill; and if there be such a covenant, it is not one on which the assignee of the reversion can sue.

There is no such covenant expressed, and it cannot be implied, because the contract set out is incompatible with such implication: *expressum facit cessare tacitum*. The express contract recited between Sir C. Turner, the defendant, and five others for the erection of the smelting mill, is incompatible with any implied covenant to that effect on the part of the defendant alone; and *Saltoun v. Houstoun*, 1 Bingh. 433, which was relied on in the Court below, is distinguishable, because in that case there was no express contract incompatible with the contract implied.

But if any covenant can be implied, the plaintiff is not entitled to sue on it. It is not a covenant that runs with the land or binds the assignee of the covenantor, and the case falls within the principle of the first and second resolution in *Spencer's case*, 5 Rep. 17: "When the covenant extends to a thing in *esse* parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and *extends to the support of the thing demised, and, therefore, is *quodammodo* annexed appurtenant to houses, and shall bind the assignee, although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not in *esse* at the time of the demise made, but to be newly built after, and, therefore, shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being. And it was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and, therefore, shall bind the assignee by express words. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and, therefore, in such case the assignee of the thing demised cannot be charged with it no more than any other stranger."

The mill was not in *esse* at the time of the demise; the waste on which it was to be built was not demised; and the mill was no more necessarily connected with the mines than a corn mill with the cultivation and growth of corn.

*650] Nor, if it had been built, could the plaintiff *singly have had any right to it. In *Vyvyan v. Arthur*, 1 B. & C. 410, and *Vernon v. Smith*, 5 B. & A. 1, the subject in dispute was clearly attached to the property demised.

Alderson, contra, was stopped by the Court.

ALEXANDER, C. B.(a) Two points have been raised in this case. First, whether there be any covenant on the part of the defendant below to erect a

(c) *Tindal, C. J.*, was absent.

smelting mill; and, secondly, whether such a covenant, if it exist, runs with the land. And, first, we are all of opinion that in this demise there is a distinct covenant on the part of the defendant below to erect a smelting mill. Any words in a deed which show an agreement to do a thing amount to a covenant; Com. Dig. *Covenant*; and here it is recited, that the defendant and others had, with the permission of Sir C. Turner and two others, taken down a smelting mill, and did engage to erect at their own expense a smelting mill of larger dimensions; which mill it had been agreed should belong to Sir C. Turner and the two others in lieu of the mill so taken down. And then Sir C. Turner demises "all that undivided third part or share of the said Sir C. Turner of and in all and singular the mines, veins, pipes, floats, strings, and parcels of lead, tin and copper ore, and other minerals and fossils of what nature or kind soever, which were then known, found, or discovered, or gotten, in, within, upon, from, or under all the moors, commons, wastes, and unenclosed lands, situate, lying, or being in, within, or parcel of the several manors or lordships of Arkindale, New Forest, and Hope, in the county of York, or any of them; and also of and in all mines and seams of *coal, and [651] quarries of stone, in or within the said manors or lordships, or reputed manors or lordships, or any of them, or any part thereof respectively; and also of and in all smelting mills, stamping mills, refining mills, storehouses, workhouses, smiths' forges, sheds, hovels, and buildings standing or being in or upon any part of the said moors, commons, or wastes, which then were, or at any time theretofore had been commonly used or employed for mining purposes: and with full power (but so far only as Sir C. Turner could lawfully grant the same, and not otherwise) for A. S., J. S., G. D., the defendant, W. H., and F. H., their executors, &c., to have heap-room, &c., upon the said moors, commons, wastes, and unenclosed lands, for laying, placing, &c., the ores, &c., wrought and dug out of the mines and quarries, of which one third was thereinbefore demised, and with full power (so far as, &c.) to turn and to dig water-courses, &c., to do all other things (hushing only excepted) as might be necessary; and also full power and authority to erect or build in or upon any part of the said moors, commons, wastes, and lands then unenclosed, all such smelting mills, stamping mills, &c., as might be requisite for effectually working the said mines: *Habendum*, to A. S., J. S., G. D., the defendant, W. H., and F. H., for nineteen years: and the defendant did in and by the said indenture, for himself and his heirs, &c., covenant, promise, and agree to and with the said Sir C. Turner, his heirs, &c., that the said A. S., J. S., G. D., the defendant, W. H., and F. H., their executors, administrators, and assigns, should and would during the continuance of the said demise, maintain, preserve, and keep the said smelting mill engaged to be erected and built by them, with the waterwheel to the same belonging, and the bobbies, ore-houses, and other houses, bingsteads, sheds, and other buildings *already [652] erected, and which during the continuance of that demise should be erected contiguous or near to the said mill, in good and sufficient condition and repair, and should at the expiration or other sooner determination of the said term deliver up the same in good and sufficient condition and repair."

On this we think it clear that there is a covenant binding the defendant and his assigns, and that the assigns of Sir C. Turner are entitled to the benefit of it.

Spencer's case lays down the rule, that if the lessee covenant for him and his assigns to do anything on the land demised, it will bind the assignee though the covenant should extend to a thing to be newly made. And in the Mayor of Congleton v. Pattison, 10 East, 135, Lord Ellenborough says, "A covenant in which the assignee is specifically named, though it were for a thing not in *esse* at the time, yet being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it." That is the rule to be extracted from Spencer's case and from all which have followed it.

Much of the argument here has turned on the assertion that there is no connexion between the smelting mill and the mines; but the demise is of mines, and of "smelting mills, stamping mills, refining mills, store-houses, work-houses, forges, sheds, hovels, and buildings standing or being upon any of the said commons, moors, or wastes, with full power to have heap-room upon the said moors, &c., for laying and placing the ores dug out of the mines;" and it is impossible to doubt that the demise of the mines is immediately connected with the possession of the smelting mill. The case, therefore, falls within the principle laid down by Lord Ellenborough in the decision referred to, and this was an interest running with the land.

It has been urged, indeed, that we cannot imply a covenant by the defendant alone where there is an express agreement by the defendant and others touching the same subject-matter. But the agreement is several as well as joint, and, therefore, the judgment by the court below must be affirmed.

Judgment affirmed.

WILLIAMS v. PAUL. June 19.

The defendant kept a heifer which he had bought of a drover on Sunday, and afterwards made a promise to pay for:
Held, that having kept the beast he was liable at all events, on the *quantum meruit*, notwithstanding the contract made on Sunday.

THE plaintiff's drover being on a journey from Sussex to Wales with sundry beasts belonging to his master, sold three cows and a heifer to the defendant, in order to procure funds to proceed on his journey. The bargain was made, and the price (to be paid in three months) agreed on, on a Saturday evening, subject to the defendant's approval of the beasts upon inspection the next morning. Accordingly, on Sunday the defendant inspected and approved the beasts. The drover proceeded on his journey, leaving behind the three cows and a heifer, which the defendant alleged was not the one he had chosen, and ultimately refused to pay for; but the four beasts remained with him. Some time afterwards the defendant, being applied to by the drover for the price, said he would settle when the time agreed on was up.

The heifer, however, remaining unpaid for, this action was commenced for the price. Bayley, J., before whom the cause was tried, thought the defendant having kept the beast, and subsequently promised to pay, was liable for the value upon a *quantum meruit*, though not for the price agreed on by the bargain completed on Sunday.

A verdict having been found for the plaintiff,

Andrews, Serjt., obtained a rule nisi to set it aside and enter a nonsuit, on the ground that the contract was void under 29 Car. 2, c. 7, being a contract made in the plaintiff's ordinary vocation, and completed on Sunday.

Bompas, Serjt., showed cause. This contract was made on Saturday, and the mere inspection of the cattle on Sunday did not render it void, otherwise the statute would become the instrument of gross injustice if the defendant be permitted to keep the beast without paying for it. But, at all events, the defendant having retained the beast, and having afterwards promised to pay for it, is liable upon the new promise. In *Bloxsome v. Williams*, 3 B. & C. 232, *Fennell v. Ridler*, 5 B. & C. 406, and *Smith v. Sparrow*, 4 Bingh. 84, the contract was clearly made on Sunday, and there was no subsequent promise.

Andrews. This falls within the principle of all the preceding cases, and if the defendant be held liable on a *quantum meruit* because he retains the beast, a mode is pointed out by which the statute may be eluded in all cases.

PARK, J. (a) I should be sorry to be supposed to recede from the cases decided on this point, and the principle established to enforce the observance of the

(a) Tindal, C. J., was absent.

Lord's day, which tends so eminently to the advantage *of society, since no laws can be of avail except in so far as they are founded on religion. [*655]

I think that the contract in this case was made on Sunday, because the bargain on Saturday was incomplete, and came to no conclusion till the defendant had inspected the cattle on Sunday.

However, we hold the defendant liable on the ground taken by the learned Judge at the trial, although we regret to be obliged to come to this conclusion, because it may have a tendency to defeat the statute. But here it appears that the defendant not only retained the animal, but made a new promise to pay subsequently to the Sunday, and his present refusal is not consistent with the practice of a very sincere Christian.

GASELEE, J. I am of opinion that this contract was made on Sunday, but what passed afterwards is sufficient to sustain the verdict. The subsequent promise was sufficient on the *quantum meruit*, or as a ratification of the agreement of Saturday.

BOSANQUET, J. I am of the same opinion, and think the ground taken by the learned Judge at the trial correct. The original contract was on Sunday; but the thing sold was left in the possession of the defendant. Some time afterwards he promised to pay; and the jury having found the value, there is no ground for impeaching the verdict. Rule discharged.

*ROE dem. DURANT v. MOORE. June 19.

[*656]

Surety recognisance in ejectment pursuant to 1 G. 4, c. 87, how entitled.

In this case the tenant having been admitted to defend instead of the casual ejector, put in sureties to abide the result of the cause pursuant to the statute 1 G. 4, c. 87. See *ante*, p. 574. And upon an objection taken by *Wilde*, Serjt., it was ordered that the recognisance of sureties should be taken in the cause entitled as above, and not in the cause as originally entitled, *Roe d. Durant v. Doe*, Moore tenant; because it would be in the cause entitled as above that the lessor of the plaintiff, if successful, would have his claim on the sureties.

These sureties appeared to be the first taken since the statute in either court.

ADAMS v. GIBNEY, sued with ELIZABETH MARIA PEYTON, Executor of J. R. PEYTON. June 14.

Tenant for life, remainder over, by indenture demises to lessee, his executors, &c., for fifteen years, without any express covenant for quiet enjoyment; lessee is evicted by remainder-man after death of tenant for life, and before expiration of the fifteen years: Held, that lessee cannot maintain covenant against executor of tenant for life.

THE declaration stated, that, on the 20th of November, 1821, by indenture between J. R. Peyton of the one part, and the plaintiff of the other part, after reciting that the plaintiff had agreed with J. R. Peyton for a lease of Wakehurst Park for the term of fifteen years from March then last past, subject to the covenants *thereinafter contained, it was witnessed, that for and in consideration of the rent, covenants, and agreements thereafter contained, J. [*657] R. Peyton had demised certain premises to the plaintiff, containing 500 acres, &c., (subject to certain exceptions and reservations;) *Habendum* from the 25th of March, 1821, for fifteen years at the rent of 40*l.* per annum, clear of all taxes except *poors' rates*; which *poors' rates* were to be paid by J. R. Peyton, his

executors, or administrators, or such other person or persons as should for the time being be entitled to the reversion and inheritance of the said premises;

And the plaintiff for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said J. R. Peyton, and to and with all and every such person and persons as should for the time being be entitled to the reversion and inheritance of the said premises, or any part thereof, in manner and form following; that is to say, that the plaintiff, his executors, administrators, or assigns should and would from time to time, and at all times during the continuance of the term thereby demised, well and truly pay, or cause to be paid unto the said J. R. Peyton, his heirs, executors, or administrators, or to such other person or persons as aforesaid, the said yearly rent of 40*l.* of lawful current money as aforesaid upon the several days and times, and in the manner thereinbefore mentioned: he also covenanted not to cut down, lop, top, stub up, or destroy any of the trees thereinbefore excepted, or else to pay the sum of 20*l.* per load for trees so lopped, &c., to the said J. R. Peyton, or such person or persons as aforesaid: a new fence was to be made all round the park, at the joint expense of both lessor and tenant; and J. R. Peyton was to put the messuage on the premises into good and tenantable repair: the said *658] fence, building, and messuage was to be thenceforth kept in *repair by the plaintiff, and J. R. Peyton was to provide thirty new rabbit hutches for the use of the plaintiff: and it was covenanted that it should and might be lawful for the plaintiff, his executors, administrators, or assigns, at any time or times during the continuance of the term thereby demised, to cut down the underwood that might be standing and growing on the demised premises, at such age as he or they should think fit, and take and carry away the same for his and their own use and benefit; and also that he, the said J. R. Peyton, his heirs, executors, or administrators, or such other person or persons as aforesaid, should and would, at the end, expiration, or other sooner determination of the said demise and lease, pay the plaintiff, his executors, administrators or assigns, for the underwood then standing and growing on the demised premises down to the stem, and also for the stock of rabbits that might then be thereon, as the same should be valued and appraised by two indifferent persons, one to be chosen by each party, and in case they could not agree, by a third person to be appointed by them for an umpire, whose valuation and appraisement should be final and conclusive, and the amount thereof be paid by the said J. R. Peyton, his heirs, executors, or administrators to the plaintiff, his executors, administrators, or assigns.

The plaintiff entered the 20th of November, 1821, and averred, that he well and truly performed all things on his part contained in the said indenture.

Breach—That before and at the time of the making the said indenture, and from thence until and at the time of the death of the said J. R. Peyton, he, the said J. R. Peyton was only seised of the demised premises in his demesne as of freehold for the term of his natural life, and was not by law empowered, autho- *659] rized, or entitled to grant or demise to the plaintiff the demised *pre- mises for the said term of fifteen years in manner aforesaid, or for any period beyond the term of the life of the said J. R. Peyton, so as to bind the person entitled to the freehold of the demised premises, upon the death of the said J. R. Peyton, or to render such term and lease obligatory upon such person: that whilst the plaintiff was possessed of the said term by the said indenture granted, to wit, on the 1st of April, 1825, the said J. R. Peyton died, to wit, at, &c., and thereupon the said term ended and was determined and became void, and one Joseph John Wakehurst Peyton then and there became and was entitled to the freehold and inheritance of the demised premises and the possession thereof, and laid claim to and demanded of the plaintiff the immediate possession of the said premises in breach of the said indenture: that thereupon, afterwards, to wit, in Trinity term in the seventh year of the reign of our lord the now king, a certain action of ejectment was commenced and prosecuted by and on the behalf of the said J. J. W. Peyton, wherein John Doe was the nominal

plaintiff, against the said now plaintiff Thomas Adams, for the recovery of the possession of the premises so demised by the said indenture: That, on the 2d of December, 1826, notice was given to J. R. Peyton's executors that the now plaintiff would hold them responsible for all damages, costs, losses, or expenses he might sustain or incur by reason of the said action, in the event of the plaintiff therein succeeding in such action, or the said Thomas being interrupted in the possession or enjoyment of the said tenements, or any part thereof, or evicted therefrom during the remainder of the said term of fifteen years under or by virtue of the said ejectment, or by reason of any defect of title or inability of the said J. R. Peyton to grant the said lease to the said Thomas as aforesaid: that the defendants refused to *settle such action of ejectment: [*660 that the now plaintiff accordingly defended the said action, being ignorant whether J. J. W. Peyton had or not full right and title to the premises: that in Easter term, 1827, judgment was recovered in the said action of ejectment; whereupon the now plaintiff was forced to deliver, and did deliver up the possession of the premises to J. J. W. Peyton: that the now plaintiff sustained damage thereby for loss of the enjoyment of the premises, and also did, on the 26th May, 1827, pay the damages and costs sustained in the said action of ejectment, amounting to the sum of 189*l.*; also his own costs of defending the said action: that in Hilary term 1828, an action of trespass was brought by J. J. W. Peyton for mesne profits, and on the 22d February, 1828, the now plaintiff gave the now defendants, as executrix and executors, notice of such action: that in Hilary term 1829, the costs and damages recovered in the last-mentioned action were 477*l.*, and that the now plaintiff's own costs incurred in the said last-mentioned action were 200*l.*: that on the 15th February, 1827, a bill in Chancery was filed by J. J. W. Peyton to restrain the commission of waste, and an injunction obtained; and that plaintiff was hindered and prevented from cutting the underwood by reason of the lease being determined.

Second breach,—That there was a large quantity of underwood and stock of rabbits on the premises, which underwood and rabbits the now plaintiff resigned on the premises; and that he was always ready to appoint a proper person to value the underwood and rabbits, and on the 2d December, 1826, gave notice to that effect, but that defendant refused to concur.

There were various pleas, which the plaintiff replied to; and the defendant having demurred to the *replication, upon the argument, in Easter term, [*661 excepted to the sufficiency of the above declaration.

Scriven, Serjt., in support of the demurrer. The action does not lie. Where there is no express covenant for quiet enjoyment, a covenant to that effect may in general be implied from the lessor's taking on himself to demise: *Nokes's case*, 4 Rep. 81: and the lessee, or his representatives, will be liable on such a covenant, if it be violated during the term by himself or persons claiming through him: *Stile v. Herring*, Cro. Jac. 73, 1 Roll. Abr. 520; or if he have no title, and the lessee cannot lawfully enter. But if he have title to devise in the first instance, although the term be liable to be determined on an event over which the lessor has no control, the word demise will not amount to a covenant for quiet enjoyment absolutely, but merely to a warranty that the lessee shall enjoy the term as far as concerns the lessor and persons claiming through him, and independently of the collateral event over which the lessor has not control. If the lessee require an indemnity against such collateral event, he must insist on an express covenant for quiet enjoyment.

The covenant in law, giving a right to damages for eviction, ceased with the estate which passed by the demise, and determined with the death of the lessor.

In *Swan v. Searles*, Dyer, 257 b, 1 Leon. 179, Owen, 105, it was expressly decided that this action is not maintainable against the representatives of the lessor, if the term ends by a collateral determination; *ex. gr.*, his death; or against himself, if it ends by the death of a *cestui que vie*, before eviction.

In *Stile v. Herring*, and the cases which decide that the action is maintainable where there is not any right in the lessor to make any demise, and the lessee

*662] does *not and cannot lawfully enter, the estate has not, by law, any collateral determination. It is by law a lease between the parties for certain years absolutely, and an eviction at any time during those years is a breach of the covenant, because it is an eviction while the term is, as between the parties, continuing. But in the present case, as in *Swan v. Searles*, and in *Bragg v. Wiseman*, 1 Brownl. 22, the lease has in point of law a collateral determination; the term ceases by death, and with the term ceases the covenant or warranty for enjoyment, which the law raises from the word *demise*.

As the lessee is by the determination of the lease discharged from the payment of rent and other services, so the lessor is, by the collateral determination, discharged from his warranty or covenant for quiet enjoyment. The rights and remedies are reciprocal. In *Owen*, 105, one of the reasons assigned against the claim of the lessee is, that the lessee is not termor at the time of the disturbance, in effect, because his estate is determined before the disturbance, by the death of the tenant for life, &c.

The same principle is established in *Hyde v. The Canons of Windsor*, Cro. El. 553; is recognised in *Shepherd's Touchstone*, 165, 178, and the following authorities:—*Fitz. N. B.* 145, 146, and note; *Year Book* 32 H. 6, fol. 32; *Com. Dig. Cov. (F)*; *Bac. Abr. Leases, Covenant (E)*; *Vin. Abr. Cov. (D)*; 2 Bl. Com. 304; *Cheiny v. Langley*, 1 Leon. 179, Cro. El. 157, *Andrews's case*, 2 Leon. 104, Cro. El. 214, *Procter v. Johnson*, 2 Brownl. 213. The passage in *Co. Lit.* 389 a, which states that there can be no warranty of chattels, real or personal, seems to conflict with the other authorities, but is clearly outweighed by them.

**Bompas*, Serjt., *contrd.* First, a covenant and not a mere warranty, *663] is to be implied from the word *demise*; and, secondly, an express covenant for quiet enjoyment may be collected from the whole of this contract.

A warranty doth not extend to any lease, though it be for many thousand years, or any other chattel, but only to freehold or inheritances: *Co. Lit.* 389, a. And a covenant is not confined to any technical form of expression; it results from the whole object of the contract between the parties; *Com. Dig. Cov. (A)* 2; *Holder v. Taylor*, Hob. 12; and when the lessor here says he *has* demised, the expression implies that he has the power to do so, and to secure to the lessee an enjoyment co-extensive with the term: otherwise he imposes on the lessee, and obtains a consideration for that which he cannot make good.

In *Burnett v. Lynch*, 5 B. & C. 609, *Littledale, J.*, says, "An action of covenant will lie by the lessee against the lessor upon the word '*demise*' in the lease; that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term; and, therefore, if the lessee be ousted during the term, an action of covenant will lie by him against the lessor." And in *Iggulden v. May*, 9 Vcs. 325, *Elton, C.*, says, "There is a covenant for quiet enjoyment under the words 'granted and demised': a covenant for payment of rent under the words 'yielding and paying': and other covenants under other general words in this lease. In a court of law, generally, the construction ought to be as to both the express and implied covenants: more peculiarly, where there is but one express covenant; *664] and upon the ordinary sense, it is supposed to mean express covenants only. It was settled so long ago as the time of *Siderfin*, that where a bond is given, generally for performance of covenants in a lease, it extends to protect breaches of implied, as well as express, covenants; and if rent is not paid, or there is an eviction, the bond is forfeited for breach of the two implied covenants I have mentioned."

All the cases referred to in support of the demurrer rest on *Cheiny v. Langley*, which is no authority for the propositions to which the subsequent decisions have extended; for in *Cheiny v. Langley*, the defendant only sold his interest, such as it was, without assuming to convey any other definite interest to the purchaser. *Bragg v. Wiseman*, therefore, cannot be law, if it rest for support solely on *Cheiny v. Langley*. In *Swan v. Searles*, as appears from the pleadings set out in *Bendloe*, 138, the action was brought, not for damages, but for

the term itself, which having been determined, could not be recovered: and that case has been doubted. Vin. Abr. *Covenant* (D). Wentw. Executor, 126. Roll. Abr. 82 a. In Andrews's case, and Procter v. Johnson, the action was also brought to recover the term. And the passage in Fitz. N. B. 145, 146, may be explained by distributing the covenant according to the subject-matter to which it applies, *reddendo singula singulis*.

But, secondly, here is a recital of an agreement for a lease for fifteen years, and that agreement amounts to a covenant sufficiently express to support this action. In order to ascertain the covenants to which the parties have rendered themselves liable, the recital in an indenture is as operative as any other part. 3 Keble, 465. [PARK, J. Lord Kenyon reprimanded me when I was at the bar for citing Keble.] Severn v. Clerke, 1 Leon. 122.

**Scriven*. A recital in a deed containing express covenants cannot be set up as an express covenant in itself, contrary to the intention to be collected from the operative part of the deed; and therefore it comes round to the same question, whether a covenant for quiet enjoyment can in this case be implied from the word *demise*. Holder v. Taylor does not apply, for the action was brought in respect of a disturbance by the convenantor himself. And the *dicta* which have been cited are applicable only to cases of that description. There is no hardship in the present case, for the lessee is discharged from his obligations under the lease, and it was his business to have exacted an express covenant, if he proposed an indemnity for the loss of any portion of the fifteen years. *Caveat Emptor*. He could scarcely, however, have been ignorant of his situation, for his covenants are not with the lessor, his heirs and executors, but with the party interested for the time being. *Cur. adv. vult.*

TINDAL, C. J. The question in this case arises upon a demurrer to the replication to one of the pleas of the defendant, which plea is pleaded to the breach of covenant firstly assigned in the declaration, that is, to a breach of covenant for quiet enjoyment; and as the defendant insists that it appears on the record that no action is maintainable against him as executor on such supposed breach, it becomes unnecessary to consider any of the pleadings subsequent to the declaration.

The question, therefore, becomes this: tenant for life, remainder over, by indenture demises to the lessee, his executors, &c., for the term of fifteen years, without any express covenant for quiet enjoyment; the lessee is evicted by the remainder-man, after the death of tenant for life, but before the expiration of the fifteen years: *whether the lessee can maintain an action of covenant against the executor of tenant for life in respect of such eviction? [666]

That the word *demise* in a lease for years imports and makes a covenant in law for quiet enjoyment by the lessee, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities, and is admitted by the defendant; but it is contended on his part, that such implied covenant ceases with his estate, as well upon the ground that it is rather in the nature of an implied warranty than an implied covenant, as upon the direct authority of decided cases.

If it had been necessary to determine this case upon the ground of distinction above referred to, considerable doubt would be thrown upon such distinction in the case of a chattel real, by the authority of Co. Litt. 389 a, where it is laid down "That a warranty cannot be annexed to chattels real or personal,—but if a man warrant them, the party shall have covenant." We think, however, it is sufficient to say, that the cases which have been decided on the precise point now raised, are too strong to get over. Such is the case in Dyer 257 a, determined in Michaelmas term 8 & 9 Eliz. The lease in that case, as in the present, was by indenture made by tenant for life, by the word *demise*. The ouster in that case, as in this, was by the remainder-man after the death of the tenant for life, and before the effluxion of the term. The action in that case also, as in this, was an action against the executors of the lessor, to recover damages for the breach of covenant. (See the form of the declaration in Bendloe's Rep. 150.) And after two arguments it was held in that case by three of

the justices, "That the executors should not be charged by this covenant in law—because the covenant *in law ends and determines with the estate and interest of the lessor;" also, "That no cause of action is given against the testator in his lifetime." And, although one of the justices differed from the rest, yet he admitted, if the lease had been by deed-poll instead of by indenture, he should have agreed with his companions: a distinction which is not assented to by the learned reporter.

The same principle is laid down in *Hyde v. The Canons of Windsor*, and in the case of *Bragg v. Wiseman*, where covenant is brought against the executor of the husband upon a lease by husband and wife, and it is laid down, "That a covenant in law shall not be extended to make one do more than he can, which was to warrant it as long as he lived, and no longer."

Unless, therefore, some very strong and insuperable objection had been raised to the principle of those decisions, which has not been done in the present case, we think it safer to adhere to them, the doctrine of which appears to have been adopted in books of high authority; amongst others see *Shepherd's Touchstone*, 160, and *Com. Dig. Covenant* (C). And no injustice can be occasioned to the lessee by this decision, who must have known, from the form of the reservation in the lease, that his lessor was no more than a tenant for life, but was contented to accept a lease without an express covenant for quiet enjoyment.

It remains only to notice one argument urged by the plaintiff; namely, that although the action may not be maintainable upon the covenant to be implied from the word *demise*, yet that there is a recital of an agreement for a lease for fifteen years, and that such agreement would of itself be a sufficient express covenant to support the action. But the recital is not of an agreement for a lease for fifteen years absolutely, but for a *lease for fifteen years "subject to the covenants thereafter contained." So that the demise by the indenture, is the completion and performance of that agreement, and the question still turns upon the lease itself, whether the lease contains such ground of action as is contended for.

Upon the whole, therefore, we think there must be judgment for the defendant as to so much of the declaration as is covered by the plea demurred to.

Judgment for defendant accordingly.

WORMWELL v. HAILSTONE. June 17.

Is an action against the clerk of the trustees of a turnpike road, under a statute which permits the trustees to sue and be sued in the name of their clerk, execution cannot issue against the clerk personally.

THIS was an action against Samuel Hailstone, clerk to trustees acting under and by virtue of the statute made and passed in the sixth year of the reign of our lord the king, for repairing, widening, improving, and maintaining in repair the turnpike roads from Leeds to Halifax, and the several branches and roads therein mentioned in the West Riding of the county of York, that is to say, the trustees appointed for the Thornton district of road in the said act mentioned: and the first count of the declaration stated that the said trustees were indebted to the plaintiff in the sum of 800*l.* for work and labour, and materials found; and, being so indebted, promised to pay. A verdict having been given for the plaintiff, the *postea* was entered up as follows:—

Afterwards, that is to say, on the day and at the place within contained, before the Honourable Sir James Allen Park, knight, one of his majesty's justices *assigned to hold pleas in the Court of our lord the king of the Bench, and the Honourable Sir James Parke, knight, one of his majesty's justices assigned to hold pleas in the court of our lord the king, before the king himself, and justices of our said lord the king assigned to hold the assizes in and

for the county of York, according to the form of the statute in such case made and provided, come as well the within-named plaintiff as the within-named defendant, by their respective attorneys within mentioned; and the jurors of the jury whereof mention within is made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the *trustees* within mentioned did undertake and promise in manner and form as the said plaintiff hath within complained against the said defendant, and they assess the damages of the said plaintiff on occasion thereof, over and above his costs and charges by him about his suit in this behalf expended, to 448*l.* 9*s.*; and for those costs and charges, to forty shillings. Therefore, &c.

Judgment was hereon signed against the defendant, upon which a *fi. fa.* issued, following the terms of the judgment, and the sheriff, conformably with the *fi. fa.*, issued his warrant to his bailiffs, commanding that they, some or one of them, should omit not by reason of any liberty within his county, but that they should enter the same, and cause to be levied of the goods and chattels in his bailiwick of Samuel Hailstone, clerk to the trustees acting under and by virtue of the statute made and passed in the sixth year of the reign of our Lord the now King, for repairing, widening, improving, and maintaining in repair the turnpike roads from Leeds to Halifax, and the several branches and roads therein mentioned in the West Riding of the county of York, that is to say, *the trustees appointed for the Thornton district of road in the said act men- [670] tioned, the sum of 525*l.* 14*s.*, which in his said Majesty's court, before his said Majesty's justices at Westminster, were awarded to James Wormwell for his damages which he had sustained, as well by reason of not performing certain promises and undertakings made by the said trustees to the said James, as for his costs and charges by him about his suit in that behalf expended, whereof the said Samuel was convicted, as appeared to his said Majesty of record, &c.

A levy having been made of the goods of the defendant,

Jones, Serjt., obtained a rule *nisi* to set aside the execution, on the ground that the name of the defendant, as clerk to the trustees, was only used for convenience, and that he was not personally responsible to the plaintiff.

By the general turnpike act, 3 G. 4, c. 126, s. 74, it is enacted, "That the trustees and commissioners of every turnpike road may sue and be sued in the name or names of any one of such trustees or commissioners, or of their clerk or clerks for the time being; and that no action or suit to be brought or commenced by or against any trustees or commissioners of any turnpike road by virtue of this or any act or acts of parliament in the name or names of any one such trustees or commissioners, or their clerk or clerks, shall abate and be discontinued by the death or removal of such trustee, commissioner, clerk or clerks, or any of them, without the consent of the said trustees or commissioners; but that any one of such trustees or commissioners shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants (as the case may be), in every such action or suit: Provided always, that every such *trustee, commissioner, clerk [671] or clerks, shall be reimbursed and paid, out of the moneys belonging to the turnpike roads for which he or they shall act, all such costs, charges, and expenses as he or they shall be put unto or become chargeable with, or be liable to, by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants."

By the 4 G. 4, c. 95, s. 61, it is provided, "That the trustees or commissioners for making or maintaining any turnpike road, shall not be personally subject to or liable to be charged with the payment of any sum or sums of money by reason of their having signed or executed any mortgage, or assignment by way of mortgage, or other security, to be made by virtue or in pursuance of any act for making and maintaining any turnpike road: Provided always, that in case any action, suit, or prosecution shall be brought or commenced against any trustee or commissioner for anything done by virtue or in pursuance of the said recited act of the third year of his present Majesty, or this act, or any

such act for making or maintaining any turnpike road, all the costs, charges, and expenses of defending such action, suit, or prosecution, or which such trustee or commissioner shall incur in consequence thereof, shall be defrayed out of the toll arising on the turnpike road for which such trustee or commissioner shall act."

By 7 & 8 G. 4, c. 24, s. 2, it is enacted, "That every trustee who shall order or direct the expenditure of any money for or towards the making, repairing, or altering any road not comprehended within the act in the execution of which he may be acting, or for or towards the performance of any act, matter, or thing not authorized by such act or the said recited acts, shall be personally liable to the trust for the repayment of the money so expended at the suit of any person, *672] or any one trustee, or of the clerk to such trustee on behalf of *such trust, and that all the costs and charges of such suit, over and above any costs and charges recovered from the defendant in such suit, shall be paid and borne by such trust." And by the third section, it is enacted, "That no trustee shall be personally subject or liable to be charged (except as next hereinbefore mentioned) with the payment of any sum or sums of money laid out or expended in or towards the making, repairing, or altering any turnpike road, nor shall execution issue out against the goods and chattels of any trustee, by reason of his having acted as such trustee, or having signed or authorized, or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have, in express words, rendered himself so personally liable."

By a local act, 6 G. 4, c. 149, intituled, "An Act for repairing, widening, improving, and maintaining in repair the turnpike roads from Leeds to Halifax, and the several branches and roads therein mentioned in the West Riding of the county of York," the usual powers are given to the trustees therein mentioned for making the roads and branches therein described, and amongst others, the Thornton district of road: and creditors are enabled to have access to the books of the trustees.

Taking all these acts together, it appears that the clerk of the trustees is only the formal plaintiff or defendant, in actions by or against trustees, like the fictitious parties in the action of ejectment. It is plain from the declaration in this case, that the trustees are the real defendants. The object of the section, which enables creditors to sue the clerk, was to prevent the inconvenience and difficulty of suing the trustees, a numerous and fluctuating body; it never was intended to make the clerk personally responsible, when the trustees are personally exempted, but that the remedy of creditors should be against the fund *673] of the road: as *by a *mandamus* to the trustees; or otherwise. Great inconvenience would be experienced in making the clerk personally liable; as if he were to die after judgment and before execution, could execution issue against his executor, who might not be clerk, or his successor, who would be no party to the record? The local act, 6 G. 4, c. 149, ss. 25, 27, enables creditors to have access to the books of the trustees, which shows that the legislature intended their remedy should be on the funds of the road.

Wilde, Serjt., showed cause. The creditor is permitted by the act 3 G. 4, c. 126, to make the clerk defendant, and there is nothing in the act to exempt him from the incidents attaching to a defendant in any other suit. It is because the trustees are personally exempted that it becomes necessary to make the clerk personally responsible; in which there is great convenience to creditors, and neither inconvenience nor injustice to the clerk: the creditors having a single assignable individual to apply to, who, by his influence with the trustees, is likely to obtain payment of the demand; and the clerk being entitled under the act to be reimbursed all his expenses, by the trustees: for the word *expenses* must, in common parlance, be taken to cover debt and damages. The execution must pursue the form of the judgment; the judgment here is against the clerk, and would be fruitless if he be not liable to execution. In the riot act, statutes of hue and cry, dock acts and others, there are explicit directions as to the mode

of obtaining the fruits of a judgment. In the absence of any such directions here, it must be presumed the law is to take its usual course. The statute says, the clerk shall *always* be deemed to be defendant; if so, he must be defendant for the purposes of execution as well as for the purpose of *appearance. [674] As to any technical difficulty in case of his death, the plaintiff is not to be deprived of his remedy where the clerk is alive, because the legislature may not have anticipated or provided for difficulties in case of his death. But in the spirit of the enactment, which enables a creditor to make him a defendant in the first instance, the Court might, upon his death, permit the plaintiff to enter a suggestion, and issue a *scire facias* against his successor.

Jones was heard in support of his rule; and in addition to the arguments urged before, observed on the hardship of the clerk's being sent to gaol for a debt from which his principals were exempt from execution, and the absence of any clause in the acts to reimburse him for anything but costs and expenses, which, he contended, did not cover damages.

The Court took time to look into the local act, and now their decision was pronounced by

TINDAL, C. J. This is an application to the Court to set aside the writ of *fi. fa.* which has been issued upon the judgment obtained against the defendant, on the ground that the statute 3 G. 4, c. 126, s. 74, which enables the plaintiff to sue the defendant as clerk to the trustees of the turnpike road does not authorize any execution against either the person or the property of the defendant.

The clause in question appears to have been introduced, from the difficulty, or indeed impracticability, of carrying to a successful result any action, either by or against the whole of the very numerous and fluctuating body of which the trustees of a turnpike road generally consist. The clause, therefore, empowers, but does not *compel, the trustees to sue or be sued in the name or [675] names of any one of such trustees, or of their clerk or clerks for the time being, leaving it open to any creditor, if he shall think proper, to sue by the ordinary course of proceeding against any number of the trustees personally, where the nature of the transaction, or the form of the security or contract, gives any ground of action against those particular and individual trustees.

In the latter case, the action would have been attended with the ordinary consequences of personal liability on the part of the defendant, had not a later statute, the 7 & 8 G. 4, c. 24, s. 3, taken away the personal liability of the trustees in every case, unless where the trustees have in the contract or security in express words rendered themselves personally liable.

A provision of this nature releasing the trustees from liability when the action is brought against them, although they may be the very parties to the contract or security on which the action is brought, affords a strong presumption that it could not be intended the clerk to the trustees should be personally liable, when the creditor sues the trustees in the name of their clerk. It would be very singular that the creditor of the trustees should have his election to satisfy his demand either out of the trust funds or the personal means of the clerk of the trustees, according to the form of the action he thought proper to bring.

But we think, under the proper construction of the seventy-fourth section, the clerk is not personally liable to the consequences of an action. The power to sue the trustees in the name of their clerk is, in other words, the power to make him the *nominal* defendant: the enactment that the suit shall not abate by the death or removal of the clerk, but that the clerk for the time being shall always be deemed to be the defendant, *points again to the same distinction between a real and nominal defendant; and, indeed, it would open the door [676] to inextricable confusion and difficulty if the clerk for the time being were personally to be looked to for satisfaction of the judgment. Suppose the clerk, in whose name the action was defended, to die, or be removed after judgment and before satisfaction, it would seem very unreasonable that his successor, who was no party to the defence, should be liable to pay the whole; or, on the other

hand, that the executors of the former clerk, who have no concern whatever with the trust funds, should be liable to the demand out of the testator's assets.

But the main ground upon which we collect the intention of the legislature is this: the only provision for reimbursement of the clerk is a reimbursement of all the costs, charges, and expenses which he has been put to by reason of being made defendant.

The ordinary meaning of these words will not comprehend the debt or damages recovered, and this must give at the same time the measure of the clerk's personal liability; for it cannot be supposed that he is liable to either the debt or damages recovered, where there is no express provision for repaying himself.

It is asked, How are the debt or damages to be recovered in this action if the clerk is not liable? This act, undoubtedly, makes no direct provision, as many others of a similar nature do, upon this subject. See the West India Dock Act, 39 G. 3, c. 69, s. 184, and the London Dock Act, 39 & 40 G. 3, c. 4, s. 150. But there can be no doubt but that the funds of the trustees may be made answerable for the amount ascertained in the action, in case of a refusal to apply them, either by a *mandamus* or a bill in equity. It is sufficient, however, for *677] the present application to decide, that we think the *act does not authorise a personal execution against the clerk, and therefore we make a rule, not for setting aside this writ of execution, but for restraining the sheriff from executing it against the personal effects of the clerk.

STRANGE v. WIGNEY. June 15.

Plaintiff left in a hackney-coach in London, and lost her reticule, containing a 100*l.* bank post bill, endorsed in blank; she issued hand-bills proclaiming her loss. Defendant, a banker at Brighton, who had never heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger, on being asked his name, said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand. The defendant did not inquire at what inn he was staying: Held, that the defendant was liable for the amount to the plaintiff.

TROVER for a bank post bill for 100*l.* In September 1829, the plaintiff came to London from Tonbridge, on the outside of a coach. She put a 100*l.* bank post bill, endorsed in blank, in her reticule, which she carried on her arm. When the Tonbridge coach arrived in Bridge Street, Blackfriars, she got into a hackney-coach, and proceeded to Smithfield. She was then handed out by a gentleman, to whom she had previously intrusted the reticule containing the bill. The gentleman had placed the reticule on the seat in the hackney-coach, where it was accidentally left, although a trunk which she had also with her was safely taken out. The plaintiff, on ascertaining her loss, made inquiries about the hackney-coach without success: but she was told at the hackney-coach office, where she applied, that she need not take any steps, as the reticule would probably be returned in a few days. Notwithstanding this, she dispersed about the hackney-coach stands and watering houses a number of bills, describing her loss, and offering a reward for the recovery of her property. She also advertised her loss in a London newspaper called *The Morning Advertiser*, on the *678] 24th of September, about eight days *after the reticule was lost. Early on the 24th a stranger presented the bill at the banking-house of the defendant, in Brighton, to be cashed. He said he was going to Southampton, and wrote, on the bill, in a very illiterate hand, the name and address of Mr. W. Wilson, 16 Queen Street, Lincoln's Inn Fields. The defendant, not having heard of the plaintiff's loss, cashed the bill, and took the usual commission. Tindal, C. J., before whom the cause was tried, Guildhall sittings after last Michaelmas term, left it to the jury to consider whether there had been originally a want of ordinary care on the part of the plaintiff, or a want of diligence in publishing her loss, or negligence in the defendant upon the occasion of cashing the bill.

The jury having found for the plaintiff,

Taddy, Serjt., moved for a new trial.

If the banker be holden liable in this case the decision will go farther than any which have preceded it, and materially tend to paralyze the circulation of paper currency. The plaintiff had taken no efficient means to make her loss known to the commercial world, or to guard against loss in the first instance. It was through the carelessness of her agent that the reticule containing the bill was left in the hackney-coach: the reticule was an unfit place of deposit; and there was great want of caution in endorsing the bill in blank, and enabling it to be transferred as money. Even if there had been a want of caution on the part of the defendant, the plaintiff has no ground of complaint: the mischief being attributable to her own previous neglect, she is not entitled to repair it at the expense of the defendant. But there was no want of caution in the defendant. He had never heard of the plaintiff's loss. The bill carried its title with it, and was *transferable as money; *Miller v. Race*, 1 Burr. 452, *Grant v. Vaughan*, 3 Burr. 1516, *Lawson v. Weston*, 4 Esp. 56; [*679 and the defendant could not, consistently with the practice of bankers, or without giving offence to customers, pursue inquiry further than to ask the name and address of the party presenting the bill. In *Gill v. Cubitt*, 3 B. & C. 466, *Abbott, C. J.*, said, the question was, whether the defendant took the bill under circumstances which would excite the suspicion of a prudent man. That cannot be predicated of the conduct of the defendant in this case. Brighton is the resort of many opulent persons, and a place of frequent departure for the Continent; and there is nothing unusual in sojourners or travellers at such a place proposing to change a 100*l.* bill. In *Snow v. Sadler*, 3 Bingh. 610, the bill was taken at Doncaster races, which are stated in the report to be a frequent resort of suspicious characters. In *Snow v. Peacock*, 3 Bingh. 406, the amount of the bill was 500*l.*, and it was changed at a branch bank in an obscure village, not likely to be visited by persons possessed of so much property. But in *Bockwith v. Corral*, 3 Bingh. 444, in an action by the owner of a lost bill of exchange against a banker who had cashed it to a stranger, it was held that the jury were properly directed to consider whether the plaintiff had used due diligence in apprising the public of his loss, and whether the defendant had acted with good faith and sufficient caution in the receipt of the bill.

TINDAL, C. J. If there had been any complaint of the manner in which the points were left by me to the jury, I should have been anxious for a reconsideration of the case. But no objection having been made to *my summing up, I am averse to granting the rule. I left three points to the [*680 jury. The first was, as to the mode in which the plaintiff had conveyed her property to London. It was urged by the counsel for the defendant, that there had been a want of caution on the part of the plaintiff in carrying in a reticule a bill of such amount, and that her negligence ought not to cast a loss upon the defendant. It was said, that it would have been safer to have placed the note in the trunk, and, looking to the event, that might have been so. In the outset, however, I do not think that there would have been a greater degree of safety in putting the note in the trunk, as the reticule was attached to the plaintiff, and a trunk might become the object of depredation. I left this fact, and the question, whether there had been any particular want of caution in the plaintiff's confiding the reticule to her friend on stepping from the coach, to the consideration of the jury. If they were of opinion that there was no want of caution on the part of the plaintiff, they were then to proceed to the second point, whether there had been any want of diligence in making her loss known. It has been said that the plaintiff did not advertise her loss sufficiently. But there is no law requiring any precise mode of proceeding in that respect, and it would be a great hardship if such a law existed. The jury are to look to the circumstances of the case, and the degree of care which has been taken. It appeared that the plaintiff had applied to the hackney-coach office respecting her loss, and there she had been informed that she need not make any stir for

some days, as in all probability her property would be restored during that time. Notwithstanding this, the plaintiff on the same day issued hand-bills describing her loss. The jury were of opinion that want of diligence was not imputable to the plaintiff; and they then went on to the third point, whether *681] there had been any want of *caution on the part of the defendant. It has been urged by the defendant's counsel that it is impossible to make inquiries of persons who present notes without giving offence. I am of a different opinion, and think that individuals who become possessed of notes in an honest way would be pleased at the praiseworthy endeavours of bankers to prevent imposition and robberies. The defendant made no inquiry as to the inn at which the stranger was staying, nor did he call for any reference to persons in the town. Besides this, the writing of the stranger was calculated to raise suspicion, being of a character far inferior to that of a person accustomed to possess such notes. The defendant should not have been satisfied with the bare assertion of the stranger with regard to his address and business, but should have inquired at least at what inn he was staying. I am therefore of opinion, that there is no ground for granting a new trial.

PARK, J. The three questions were properly left to the jury, and I see no reason for thinking their verdict wrong.

As to the first question, it is impossible to prescribe in what precise mode bills of value shall be conveyed: they are liable to be lost wherever they may be kept; and it can scarcely be objected to the plaintiff, that during the journey the property was even attached to her person.

But the two latter questions were the main points in the case; and when we find the plaintiff resorting to the hackney-coach office, and immediately distributing hand-bills, notwithstanding she had the sanction of that office for waiting, we cannot impute to her any want of diligence in making known her loss. If, *682] then, there was no neglect on her part, was there any on the *part of the defendant? I agree that 100*l.* is not a large sum for persons in a certain station to negotiate at a frequented watering-place. But the banker should at least have inquired where the stranger who presented the bill was staying, especially when his handwriting appeared to be that of an illiterate person. It was doing very little to require no more than a statement of his name and address; he should at least have been asked at what inn he was staying, and whether there was any one in the town to whom he was known.

GASELEE, J. The case was properly left to the consideration of the jury, and I see no reason for disturbing the verdict.

BOSANQUET, J. I am of opinion the verdict ought not to be disturbed. No objection has been made, or could have been made, to the direction of my Lord Chief Justice; and I am not prepared to say, even if there be some want of caution in the loser of property, that he is to be therefore precluded from recovering it where there has been negligence on the part of the person who receives it. Here the application made by the plaintiff to the hackney-coach office and the distribution of the hand-bills were sufficient diligence in making her loss known; and the want of caution in the defendant was left to the jury, who have formed the proper conclusion.

Rule refused.

See *Miller v. Race*, 1 Burr. 452, *Grant v. Vaughan*, 3 Burr. 1516, *Peacock v. Rhodes*, Dougl. 633, *Lawson v. Weston*, 4 Esp. 56, *Solomons v. Bank* *683] *of England*, 13 East, 135, *Gill v. Cubitt*, 3 B. & C. 466, *Down v. Halling*, 4 B. & C. 830, *Snow v. Peacock*, 3 Bingh. 406, *Beckwith v. Corral*, 3 Bingh. 444, and *Snow v. Saddler*, 3 Bingh. 610.

PARKER v. M'WILLIAM. *June 15.*

Where a witness remains in court after an order for the witnesses on both sides to withdraw, it rests in the discretion of the Judge, whether such witness shall be heard; except in the exchequer, where he is peremptorily excluded.

THE plaintiff had deposited 200*l.* in the hands of a Miss Horsefall, who soon afterwards died. The defendant, who was appointed her administratrix, refused to return the 200*l.*, and this action was brought to recover it.

At the trial before Tindal, C. J., Middlesex sittings after Easter term, before the counsel for the plaintiff had opened his speech, it was arranged by both parties, that the witnesses on both sides should be sent out of court, and an order to that effect was given out loudly. After the counsel for the plaintiff had concluded his statement of the facts of the case, which he detailed with some minuteness, the first witness for the plaintiff, on being called, walked to the witness-box from a part of the court near the plaintiff's counsel, where he had been standing during the whole of the speech, notwithstanding the order which had been given for all the witnesses to retire. This witness spoke to the most material fact in the case, viz. to the fact of the deposit having been made by the plaintiff. But there were other witnesses *who spoke to admissions [*684 of that fact by Miss Horsefall. The counsel for the defendant objected to his evidence being received; and the Chief Justice then inquired of the witness if he had heard the speech: he replied immediately that he had not, and, although the question was put in a low tone, assigned as a reason, that he was hard of hearing. Upon this he was admitted to give evidence.

A verdict having been found for the plaintiff,

Wilde, Serjt., moved for a new trial, on the ground that the evidence of this witness ought to have been rejected. He referred to the Attorney-General v. Bulpit, 9 Price, 4, where, in the Court of Exchequer, the evidence of a witness had been rejected under similar circumstances.

TINDAL, C. J. The rule with respect to the rejection of the testimony of witnesses who have remained in court after an order for their exclusion has obtained in the Court of Exchequer for many years, and is universally known there. It was established in favour of the subject, and with a view to the fairness of proceedings chiefly at the instance of the crown. But no such inflexible rule or practice has been established in the other courts; and where an order has been made for the exclusion of witnesses, if it be disobeyed by any one of them, it must rest with the judge to ascertain whether he remained by accident, or purposed to evade the order. In the present case the witness distinctly denied having heard any part of the counsel's speech. The circumstance of his remaining in court and of his alleged capability of hearing were fully commented on *to the jury, and they would apportion their credit accordingly. It did [*685 not appear that he was contumacious, or had acted with any sinister intent; and it is important to observe, that one object of the order for exclusion is to prevent the witnesses from conferring together in Court upon what they hear there. Then we ought to examine the rest of the evidence in the cause, to ascertain the degree of importance which might have been attached to the witness in question. Here there were three other witnesses, who all agreed they had heard Miss Horsefall say she had received 200*l.* to keep for the plaintiff, after declining at first to do so. I cannot say the jury would not have come to the same conclusion even if this witness had been out of the question. But, at all events, the degree of credit to which he was entitled having been fairly submitted to them, I see no reason for granting a new trial.

PARK, J. Whether the rule in the Court of Exchequer be a wise one or not, I do not say, but the decision in the Attorney-General v. Bulpit turns expressly on the particular and known rule of that court; a rule which was established to exclude any imputation of unfairness in proceedings between the crown and the subject. But no such inflexible rule prevails in this Court; and though a witness may have been contumacious, that is not necessarily a ground for a

new trial. There is no reason, however, for supposing that the witness here acted from contumacy. The circumstance of his remaining was commented on to the jury, and his credit duly weighed. The rejection or admission of a witness under such occasions is a question for the discretion of the Judge under all the circumstances of the case.

*686] *GASELEE, J. This is not a case which calls on the Court to interpose. It is for the Judge at the trial to say, whether, under all the circumstances of the case, he will relax the order which has been given. And one may easily imagine cases where a witness may remain in Court accidentally, or even by the contrivance of the opposite party, in order to afford a pretence for impeaching the verdict in case it should go against them.

BOSANQUET, J. As there is in this Court no such general rule as that which prevails in the Exchequer, the admission of a witness who has remained in Court notwithstanding an order for retiring, must depend on the discretion of the Judge who presides at the trial. No injustice has been done in this case, and, therefore, the rule must be refused.

Rule refused.

SHEEN v. GARRETT. June 19.

A general plea of bankruptcy under the statute ought to pursue the terms of the statute, and conclude to the country.

THE defendant pleaded to a declaration in debt on a judgment, That before the suing out of the original writ of the plaintiff against the defendant in this behalf, to wit, on, &c., at, &c., the defendant became bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts; that the judgment in the declaration mentioned was obtained by the plaintiff against the defendant for certain debts and demands in respect of which the plaintiff was entitled to prove by virtue of the said statute, as a creditor under

*687] *a certain commission of bankruptcy afterwards duly issued against the defendant; that the aforesaid several debts and demands accrued and were due from the defendant to the plaintiff before and at the time when the defendant became bankrupt as aforesaid, to wit, at, &c. And this the defendant was ready to verify; wherefore he prayed judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

The plaintiff demurred to the plea, and assigned as cause of demurrer, that the defendant in his said plea had not averred, nor did it thereby appear, that he had ever obtained his certificate of conformity under the said commission in the said plea mentioned, according to the said statute therein mentioned; nor that the defendant had in fact conformed himself to the same statute, whereby the said plea was insufficient according to the general rules of pleading. Also, that the defendant had improperly concluded his said plea with a verification, and had therein otherwise departed from the form of plea allowed by the said statute, whereby the same plea was insufficient if pleaded by virtue of that statute. Also for that the said plea was uncertain, informal, insufficient, &c.

Joinder in demurrer.

Indlow, Serjt., in support of the demurrer.

The plea is ill. It is not a special plea of bankruptcy, because it does not state the trading, petitioning creditor's debt, and other particulars necessary to complete a bankruptcy; nor is it a general plea under the statute 6 G. 4, c. 16, s. 126, because it neither pursues the words of the statute, which are, that such bankrupt may plead in general that the cause of action accrued before he became
*688] bankrupt; nor concludes to the country, as it *ought to do. *Miles v. Williams*, 1 P. Wms. 249, *Geary v. Bailly*, *Fortesc.* 344, *Poole v. Broadfield*, *Barnes*, 380, *Com. Dig. Pleader*, (E)82.

E. Lawes, Serjt., contrd. The statute does not prescribe any particular form of words, or prohibit a conclusion with a verification. And the language of this plea is sufficient to show it to be in substance a plea under the statute.

In *Miles v. Williams* the statute under which the defendant pleaded his bankruptcy was imperative that he should plead in the form there prescribed; the 6 G. 4. c. 16, enacts that he *may* so plead; and where a plea contains new allegations of fact, it ought to conclude with a verification. *Hedges v. Sandon*, 2 T. R. 439.

PARK, J.(a) I think this plea is ill. It has been urged that it is sufficient if in substance according to the statute, and that the defendant is not bound to adopt the exact words of the clause. But he has not pursued the language, or given the effect, of the statute; for I cannot agree that "the cause of action," and "the aforesaid several debts and demands," are the same thing. Nor has he pleaded specially; for had he done so, he must have stated many more particulars than are stated in this plea. If the statute does not require a conclusion to the country, the practice of pleading does, as appears by all the decided cases.

GASELEE, J. It is true the statute does not require a conclusion to the country; nor did the 5 G. 2, c. 30, which was in force when *Miles v. Williams* was decided; but it has been the uniform practice to conclude these *pleas of bankruptcy to the country. But this is not a general plea under the statute; for it does not pursue the language of the general plea given by the statute; nor is it a special plea of bankruptcy, for want of the requisite particularity. [689]

BOSANQUET, J. I think the plea is ill. If it had been a plea under the statute it ought to have concluded to the country; for though *Hedges v. Sandon* shows that in certain cases a plea may conclude either with a verification or to the country, yet there are many other cases which establish that a general plea of bankruptcy must conclude to the country; and this cannot be considered a special plea, for want of the requisite particulars. Judgment for plaintiff.

(c) Tindal, C. J., was absent.

MICHELL and MARGARET his wife, and TARLETON and ISABELLA his wife, v. Lady BETHIAH HUGHES. June 23.

A right of entry vested in husband and wife in right of the wife, passes to the assignees of the husband if he become bankrupt.

WRIT of entry *sur* abatement in the *per*, of premises, which the demandants, in right of their wives, claimed to be the right and inheritance of the said Margaret and Isabella, and into which the said Lady Bethiah had not entry but by one Mary Heywood, who unjustly abated into the same after the death of one Thomas Collingwood, the uncle of the said Margaret and Isabella, and whose heiresses they are, within fifty years last past.

The defendant pleaded, fifthly, that Tarleton was a trader, incurred a petitioning creditor's debt, and *became a bankrupt in 1815, when a commission of bankruptcy issued against him; and by an indenture between the commissioners of bankrupts of the one part, and the assignees of Tarleton of the other part, the commissioners bargained and sold to the assignees, their heirs and assigns, all the freehold and copyhold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, situate, lying, and being in the respective counties of Middlesex, Lancaster, and Northumberland, and elsewhere in the United Kingdom of Great Britain and Ireland, and also all the freehold and other messuages, lands, tenements, plantations, estates, and hereditaments, and the negroes and other slaves, servants, cattle, stores, stocks, implements, [690]

and other the appurtenances, situate, lying, and being in the islands of Grenada, Dominica, St. Vincent, St. Lucia, Trinidad, or in any other islands, parts, or places in the West Indies, or in the colonies of Demerara, Surinam, Essequibo, or any other the colonies or territories belonging to the said kingdom; and all other the real estate, lands, tenements, or hereditaments whatsoever, and wheresoever situate, lying, and being, whereof, or wherein, or whereunto, respectively, the said Tarleton, whether in his own right, or as surviving partner of Daniel Backhouse, deceased, or otherwise, at the time the said Tarleton became bankrupt, or at any time since, had any estate, right, title, or interest, in possession, reversion, remainder, or expectancy, or otherwise howsoever, with their and every of their appurtenants, and all the estate, right, title, interest, use, trust, property, benefit, power, equity of redemption, claim, and demand whatsoever, both at law and in equity of the said Tarleton, or of them the said commissioners, by virtue of the said commission, of, in, and to the same premises, every or any part thereof; and the reversion and reversions, remainder *691] and remainders, *rents, issues, and profits thereof, and of every or any part or parcel thereof, together with all deeds, evidences, and writings touching and concerning the same; to hold the same unto the said assignees, their heirs and assigns, for ever, upon trust nevertheless to and for the several uses of them the said assignees, and all other the creditors of the said Tarleton who then had sought, or who afterwards should in due time come in and seek relief by virtue of the said commission. And the said Lady Bethiah further said, that the said bargain and sale was duly enrolled in His Majesty's High Court of Chancery in England, and that by force of the said bargain and sale, and of the statute in that case made and provided, the said assignees then and there became and were entitled to all the right and interest of the said Tarleton of and in the said tenements, with the appurtenances in the said declaration mentioned, he the said Tarleton, previously to the said bankruptcy, having had by the said Isabella issue capable of inheriting the said tenements, with the appurtenances.

Demurrer and joinder.

Jones, Serjt., for the demandant. It will be contended for the defendant, that the right to bring this writ of entry passed under the assignment of the commissioners in Tarleton's bankruptcy, so that his assignees ought to be the demandants, and that, therefore, he and his wife cannot sue. But in order to establish this, the defendant must show that there was an estate in Tarleton which might and did pass by the bargain and sale, in respect of which estate such assignees could bring a writ of entry; for the record admits that this writ is maintainable but for the bankruptcy. The bankrupt law could not pass more than Tarleton had, though Tarleton might have had an interest which the bankrupt *692] law did not pass. Now Tarleton had no seisin in his own right: his wife had a right to bring a writ of entry; but even she was not seised, for the abatement had displaced any immediate interest. Even had there been no abatement, Tarleton, being seised only in right of his wife, had a mere derivative or vicarial right, and could not alone have brought a writ of entry. He was not even tenant by the courtesy. To admit of that there must be in the wife a seisin in deed. A seisin in law is not sufficient. "A man shall not be tenant by courtesy of a bare right," Co. Lit. 29 a. He could, therefore, only be introduced into the action for the sake of conformity, having no interest whatever in the land itself. It is true, that the rents might go to the husband if the demandants succeed, because the rents would become then *fruits fallen*: but the right to the rents, when recovered, is perfectly distinct from the right to bring the action. If the husband had been attainted, the king could not have had the profits. The freehold would have remained in the wife: Co. Lit. 351. On forfeiture of the profits during the coverture, the freehold remains in the wife. Dame Hale's case, Plowd. 260. If the wife had been attainted, the lord might have entered and put out the husband. But the right to recover the land of the wife consists only in privacy, and cannot be forfeited or assigned in law.

Marquis of Winchester's case, 3 Rep. 2. And, supposing the assignees entitled to sue, are the assignees and the wife to be on the record together, or are the assignees to sue alone?

In *Smith v. Coffin*, 2 H. Bl. 444, a writ of entry *sur* abatement was held to lie for the assignees of a bankrupt; but the ground of that case is, that the bankrupt himself had an actual interest, and everything that belongs to the bankrupt passes to his assignees. Here he had nothing *which, in the language of the earlier statutes, he could lawfully depart withall, and [*693 pass to the assignees.

Then, this writ of entry demands the right and inheritance: and what claim could the husband have to the inheritance? In *Jacobson v. Williams*, 1 P. Wms. 382, and other cases, it has been held, that a possibility will pass under the assignment: but it must be a possibility that can be released or assigned; and there was nothing here that could be released or assigned.

Merewether, Serjt., *contrd.* The husband had, in respect of the coverture, an interest which might pass to his assignees; and if his interest did pass, it is quite clear that the right of entry passed also to his assignees. That point is established by the case of *Smith v. Coffin*.

In the case of attainder of the wife, the freehold of the wife is put an end to; and it does not affect the present case, that under such circumstances nothing should remain to the husband. But *Jewson v. Moulson*, 2 Atk. 417, and *Higden v. Williamson*, 3 P. Wms. 132, have established that a contingent interest, or possibility in a bankrupt, is assignable. Those cases, indeed, were decided on 5 G. 2, c. 30. But in the modern law, there is nothing to limit the extent of property which passes to the assignees. Every beneficial interest passes; and this was a beneficial interest.

Jones. In *Smith v. Coffin*, the bankrupt had a right peculiar to himself, and not in *autre droit*. And the same observation applies to *Higden v. Williamson*.

Cur. adv. vult.

TINDAL, C. J. The point raised for the consideration of the Court by the defendant's plea is this,—*Whether the bankruptcy of John Tarleton, the husband of Isabella, one of the co-heiresses named in the writ, which [*694 bankruptcy took place after the abatement made upon the two co-heiresses, gives any right to bring a writ of entry to his assignees? For if the right to bring a writ of entry for any immediate estate of freehold is vested in the assignees, it follows that the demandants cannot recover in the present action.

If the writ of entry *sur* abatement, in the present case, had been brought to recover land to which the bankrupt made title to himself by descent in his own right, there could be no doubt, after the decision of the case of *Smith v. Coffin*, but that the right to bring such writ would have passed to the assignees under the usual bargain and sale from the commissioners. For as that case has established that such right of entry was an hereditament within the meaning of the bankrupt act, and that it passed to the assignees under the general words inserted in the bargain and sale, we think the same construction must be put on the present bankrupt act, notwithstanding the omission of some words in the sixty-fourth section which are to be found in the previous acts; for we think neither the extent nor the nature of the bankrupt's property intended to be vested in the assignees for the benefit of the creditors, is thereby in any way limited or confined.

But it is contended by the demandants, that the title to the land in the present writ not being made in right of the bankrupt, but in right of the wife, the husband is joined therein for conformity only, and that in consequence no right to bring the action can pass to the assignees.

This depends upon the question, What rights in the wife's estate pass to the assignees of the husband under the commissioners' bargain and sale?

If the husband had been actually seized of this land *in right of his wife, the assignees would have taken, under the bargain and sale, an im- [*695 mediate estate of freehold during the coverture. (Com. Dig. *Bankrupt*, (D)

11.) It is unnecessary, therefore, to consider any claim of the husband as tenant by the courtesy; it is sufficient for the present purpose to observe, that if the wife's seisin had been a seisin in fact, the husband would have become seised of the freehold in her right during the coverture.

If, then, such would have been the husband's right, such also would have been the right of the assignees under the bargain and sale; and if the assignees are to bring the writ of entry when the abatement has been made upon the bankrupt, in order to recover the fee which he then claims to be his right and inheritance, there seems every reason, by analogy, that when the abatement is made upon the wife, the right to bring the writ for the freehold which the husband would become entitled to would also pass to the assignees. Debts due to the wife *dum sola*, and other choses in action belonging to the wife before marriage, pass to the assignees under the commissioners' assignment, and are recoverable by them in their own name. *Miles v. Williams*, 1 P. Wms. 249. And the reason given by Chief Justice Parker, in delivering the opinion of the Court in that case, is, "That it was the intention of the bankrupt law that the bankrupt should not be trusted any more with the arrangement of his estate, but that it should be put into other hands for the safety of the creditors, and that the bankrupt should have no further intermeddling therewith."

It is argued that the demandants claim in this writ the fee and inheritance, and that it is impossible to contend that the assignees should ever claim the

*696] inheritance which belongs to the wife, and in no respect to the *husband. It may be admitted that this is the case; and if the inheritance were necessarily claimed, and no writ of entry could be found to recover a freehold only, the inference would be very strong that no right of action could vest in the assignees in respect of the abatement on the wife.

But it is clear that the demandant in a writ of entry may claim the freehold only. See *Dyer*, 101 a, where the count in a writ of entry, having stated the demandant to have been seised as of fee, was amended by a statement that he was seised at *de libero tenemento*. And in *F. N. B.* 443 a, it is laid down, that if tenant for life or tenant in tail be disseised, they may sue a writ of disseisin; but in that writ it shall not be said *quod clamat esse jus suum et hereditatem suam*, and in his count he shall set forth his especial espleas, &c. See also *Rast. Ent.* 272. *Co. Ent.* 219. So that the argument that the assignees could not sue, because they could not maintain this writ, fails where it is shown that they might maintain another better adapted to the estate which they would claim.

Upon the general ground, therefore, that in all instances in which the assignees take any interest derivatively from the bankrupt, for the benefit of the creditors, they are empowered by the bankrupt act to sue in their own name, we think the present count, in which the bankrupt sues to recover in his own name and that of his wife, land in which he would take a freehold that would forthwith belong to the assignees, cannot be supported.

Cases may occur, in which, from absolute necessity, the husband must be joined in order to recover the rights of the wife; upon those we give no opinion.

Judgment for defendant.

*697] *UNDERHILL v. Sir T. WILSON, Bart. June 22.

A sheriff's officer, at the request of U., against whom he had to execute a *fi. fa.*, continued in possession of the effects levied, and carried on the business of a farm for U. during three months; an action was then brought by the sheriff, and judgment obtained against a purchaser of U.'s crops, &c., upon which a balance remained in favour of U. after defraying the amount to be levied against U., and the attendant expenses. The sheriff having in his return taken credit for the expenses in carrying on the farm, and having afterwards, by letter, admitted the sum recovered from the purchaser of the crops, without repudiating the conduct of the officer, Held, that he, and not his officer, was liable for the balance to U., notwithstanding the officer had managed the farm at U.'s request.

THIS action was brought to recover a balance alleged to be in the hands of the defendant, as sheriff of Kent, arising from the sale of the plaintiff's household furniture, farming stock and effects, taken by the defendant in an execution issued against Underhill by one Prickett, after paying the sum which the defendant was authorized to levy, and the legal expenses attending the execution.

In June, 1828, a writ of *fi. fa.* against Underhill at the suit of Thomas Prickett, endorsed to levy 41*l.* 12*s.* 4*d.* besides costs of the writ, sheriff's poundage, officer's fees, and all other incidental expenses, and returnable on the first day of Michaelmas term, 1828, was delivered at the office of the defendant, sheriff of Kent, and a warrant was thereupon granted to Richard Hoskins, the sheriff's bailiff, to be executed.

After Hoskins had taken possession of Underhill's farm and effects under this warrant, it was agreed between Prickett and Underhill, who was Prickett's brother-in-law, that Hoskins should hold possession under his warrant till Michaelmas (at which time one Martin was to become tenant of the farm), and that the crops should be got in, as the same become in a fit state, and sold. Hoskins accordingly entered into this arrangement, and continued in possession of the effects of Underhill, consisting of household goods, *farming stock, [*698 growing crops of hops, wheat, hay, underwood, &c., until Michaelmas, suffering Underhill to carry on the farm: he advanced money to Underhill for this purpose; paid wages and various other expenses; and from time to time disposed of the crops as they became fit, and sold the household furniture by public auction. Martin, the incoming tenant, had agreed to take of the sheriff all the hay, straw, underwood, manure, &c., at a fair valuation. Martin having at Michaelmas taken possession of the farm, Hoskins required him to pay the amount of the valuation, 190*l.* Martin, however, refused to pay more than 84*l.* 14*s.* 6*d.*

Shortly after the writ was returnable, Prickett's attorney ruled the sheriff to return the *fi. fa.* After sundry fruitless applications to Martin for the 190*l.*, the sheriff returned the writ as follows:—"I have levied and made of the goods and chattels of Henry Underhill to the value of 750*l.* 13*s.* 4*d.*, out of which I have paid for rent, 143*l.*; for king's taxes, 4*l.* 8*s.* 4*d.*; for duty on hops, 49*l.* 9*s.*; for labour and expenses, 145*l.* 11*s.* 4*d.*; for possession and for auctioneer's charges, 48*l.* 10*s.* 7*d.*; and the residue, after deducting therefrom the sheriff's legal poundage, I have ready, as by the said writ I am commanded. And the said Henry Underhill hath not any other or more goods or chattels in my bailiwick, &c. &c."

This return included only 84*l.* 14*s.* 6*d.* of the valuation of Martin, and was, therefore, objected to by Prickett's attorney, who wished an action to be brought against Martin for the whole amount of the valuation, viz. 190*l.*

In Hilary term, 1829, an action was accordingly brought by the sheriff against Martin, in which Martin let judgment go by default, and a writ of inquiry was executed. And it appearing in evidence that Martin had *paid to the [*699 landlord 43*l.* 13*s.* 2*d.* on account of rent, the jury gave a verdict for the sheriff for 146*l.* 14*s.* 10*d.* damages, besides costs, which Martin subsequently paid into the hands of the sheriff. This payment was admitted by the following letter from the under-sheriff to Underhill's attorney:—

"Prickett v. Underhill.

"SIR,—This writ is returned and filed in the proper office, and you will see from that what amount was levied at the time the return was made; since which we have recovered from a Mr. Martin a further sum upon a valuation made to him, which must be added to the sheriff's return as soon as we can settle with the plaintiff, which we have not been able to do. If you are concerned for Underhill, you may, on making an appointment, inspect the accounts at our office, now in our possession.

Mr. Underhill, however, who is related to the plaintiff, and for whose accommodation the farm was carried on, knows pretty well the amount of the expenses;

he himself having received from the officer, and laid out, the greater part of the money.

"Yours, &c."

The 146*l.* 14*s.* 10*d.* recovered from Martin, added to 750*l.* 13*s.* 4*d.* actually levied, make a total of 897*l.* 8*s.* 2*d.* The sum directed to be levied, 418*l.* 12*s.* 4*d.*, added to the expenses specified in the foregoing return,—390*l.* 10*s.* 3*d.*,—amount only to 809*l.* 11*s.* 7*d.*, leaving a balance in favour of Underhill, for which a verdict was given at the trial before Tindal, C. J. It was alleged, however, by the defendant, that the balance had been left in the hands of Hoskins, who, at the request of Underhill, had laid it out in farming expenses; wherefore

*700] **Spankie*, Serjt., pursuant to leave reserved at the trial, obtained a rule nisi to set aside the verdict, on the ground that Hoskins, in undertaking the management of the farm at the request of Underhill, instead of selling the effects at once, had become the agent of Underhill, and that the action ought to have been brought, if at all, against Hoskins. He cited *Crowder v. Long*, 8 B. & C. 598, where the bailiff having acted out of the line of his duty, it was held, that as between the sheriff and the execution creditor, the act of the bailiff was not to be considered the act of the sheriff, so as to fix the latter with knowledge of the misconduct of his officer.

Wilde, Serjt., who showed cause, contended that the sheriff, by charging in his return the expenses of managing the farm, and above all by the under-sheriff's letter, acknowledging the sale to Martin, had ratified the conduct of the officer, and had adopted all his acts. In *Crowder v. Long* the sheriff was not acquainted with the most material part of his officer's conduct.

Spankie. The sheriff could not refuse to return the writ; the return, therefore, is to be referred to his public duty, and not to any adoption of Hoskins's acts; and as the under-sheriff's letter is merely explanatory of the return, it is subject to the same observation. But the sheriff is not responsible for the conduct of his officer, where it is out of the course of duty which the law imposes on such officer. The duty of the officer was to levy and sell at once: if, at the request of Underhill, he neglected that duty, and undertook to manage a farm, and receive money for the sale of crops, Underhill must look to the officer whom

*701] he so constituted his own agent, and not call on the sheriff to make good irregularities committed at his own request. It is clear that the conduct of the officer is severable from the duty of the sheriff. In *Cook v. Palmer*, 6 B. & C. 739, Bayley, J., says, "An arrangement was made by the plaintiffs and Theobald, authorising the officer to sell the whole of the goods for a certain sum. Upon that sale the officer was identified with the sheriff, to the extent of the sum to be levied, but not further; his authority to sell to a greater extent not being derived from the sheriff, but from the plaintiffs and Theobald, who thereby made him their agent as to that part of the transaction." And in *Porter v. Viner*, (a) it is clearly established that the sheriff is not responsible for a by-act of his officer, not done in pursuance of his duty. So in *Pallister v. Pallister*, (b) where the plaintiff appointed a special bailiff, the sheriff was discharged, although the bailiff had taken fees to which he had no right.

TINDAL, C. J. The question is, whether this action for money had and received ought to have been brought against the sheriff, or against Hoskins as the personal agent of the plaintiff; and it has been contended that the action ought to have been brought against Hoskins.

At the commencement of the business, indeed, Hoskins was acting in the management of the farm as agent of the plaintiff; and for what was done in the management of the farm, it is clear an action would not lie against the sheriff. And I may go so far as to say, that in some circumstances the sheriff might not be bound even by his own return. But what renders him responsible *702] in the present case is the letter written by his own agent, the under-sheriff. It would have been easy for him to have said that the sheriff would not hold himself responsible for the acts of Hoskins. But, instead of that, he says,

(a) In a note to *R. v. Sheriff of London*, 1 Chitty, 613.

(b) *Ibid.*

"we have recovered a farther sum upon a valuation made to Martin, which must be added to the sheriff's return as soon as we can settle with the plaintiff. If you are concerned for Underhill, you may inspect the accounts at our office, now in our possession."

Can it be contended that after this the sheriff is not liable to refund the money which is thus proved to have come to his hands? If the action had been brought against Hoskins, it would have been objected, *respondet superior*; and that the agent ought not to be sued where the principal is known, and has sanctioned the conduct of the agent by receiving from him the sum in dispute.

Rule discharged.

POTT v. TURNER and Another. June 22.

A ship-broker is, as such, liable to be made a bankrupt.

THIS was an action of *assumpsit* brought by the plaintiff, to recover a deposit which he had made on an agreement to purchase an estate from the defendants.

The main question on the trial was, whether or not a ship-broker, named Baker, who had previously assigned the estate to the defendants, was liable to the bankrupt laws, his affairs being at the time in a state of embarrassment. *Baker's brother stated that they had been in business at one time as [*703 ship-owners; but, that after the war, they sold all their ships, and entered into partnership as ship-brokers. They obtained payments of the freights of ships, which they paid over to the owners who employed them, after deducting their commission. They procured cargoes for ships, and consigned cargoes which arrived, to those for whom they were sent. They obtained the freight for these cargoes, and paid it over in the manner before mentioned. For several years past they had not shared any profits, as there were none to share. All the known creditors to the amount of 20*l.* agreed to take a composition for the debts on their joint estate, and to release Baker, he having assigned his property to them. The release, however, had not been executed by all.

A verdict having been found for the plaintiff,

Wilde, Serjt., pursuant to leave reserved at the trial, obtained a rule nisi to set it aside and enter a nonsuit, on the ground that a ship-broker is not, as such, subject to the bankrupt laws; and that, at all events, there had been no proof that Baker owed any debt of sufficient amount for a petitioning creditor.

Cross, Serjt., showed cause. Either as a broker, or as a person receiving other men's moneys, Baker was subject to the bankrupt law. The statute 6 G. 4, c. 16, s. 2, enacts, that all bankers, brokers, and scriveners receiving other men's moneys or estates into their trust or custody shall be deemed traders liable to become bankrupt.

The sentence, "receiving other men's moneys or estates into their trust or custody," is adjective to bankers, brokers, and scriveners; and therefore a broker *receiving other men's moneys, as Baker did, is within the operation of the statute, although he be not a broker in the ordinary sense for the [*704 management of mercantile contracts.

But if the Court should hold otherwise, a ship-broker who effects contracts for freight, falls at least as much within the general meaning of the word broker as a pawnbroker, who merely receives a deposit, and arranges no contract. And a pawnbroker has expressly been holden to be a broker within the meaning of the act. *Rawlinson v. Pearson*, 5 B. & A. 124.

If Baker was subject to the bankrupt laws, that is a sufficient objection to the defendant's title, although no petitioning creditor's debt were established; and there is no performance by the defendants of their agreement to deduce a clear title to the premises. *Wilde v. Fort*, 4 Taunt. 334, *Lowes v. Lush*, 14 Ves. 547, *Hartley v. Smith*, Buck. 368.

Wilde. A ship-broker is not a trader, and the "receiving other men's estates into their care or custody," applies only to *scriveners*, the last antecedent to the sentence. And this clearly appears from the first statute which made scriveners subject to the bankrupt laws, 21 Jac. 1, c. 19, s. 2, where, by no mode of reading the clause, can the sentence "receiving other men's moneys or estates," &c., be applied to any substantive besides *scriveners*.

And a ship-broker does not come within the meaning of the word *broker* in its general application. The business of a ship-broker is to buy and sell ships for others, and, incidentally to that, he procures cargoes for ships and receives freights. But the business of a broker is to deal with money; his duties and *705] *emoluments are regulated by acts of parliament; and a ship-broker has been expressly holden not to be a broker within the meaning of those acts. *Gibbons v. Rule*, 4 Bingh. 301.

The receipt of commission only renders subject to the bankrupt laws such as use the trade of merchandise. If Baker received money, deducting a commission, he received it, not to trade with, but to pay over.

At all events the plaintiff has no sufficient objection to the defendant's title, and is not entitled to recover without showing by the proof of a petitioning creditor's debt that Baker was liable to have a commission of bankrupt sued out against him. The cases in equity do not apply, because a decree for specific performance does not depend on sufficiency of legal title.

TINDAL, C. J. This is an action to recover a deposit on a contract for the purchase of an estate. And the question is, Whether the defendants can make a good title to the purchaser? That depends on the question, Whether the party who conveyed to the defendants be or be not subject to the bankrupt laws? A subordinate question has also arisen, Whether, supposing him to be subject to the bankrupt laws, it was incumbent on the plaintiff to prove the existence of a petitioning creditor's debt as well as an act of bankruptcy?

Whether or not Baker was subject to the bankrupt laws depends on the 6 G. 4, c. 16, s. 2, the language of which is, "That all bankers, brokers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against perils of the sea, shall be deemed traders liable to become bankrupt."

*706] *It has been contended, on the part of the defendants, that this section of the act, whether the clause be taken separately or conjointly, does not bring Baker within the meaning of the act. In fact, it is said that he cannot, strictly speaking, be called a broker. A broker is one who makes bargains for another, and receives a commission for so doing; as, for instance, a stock-broker. But, in common parlance, one who receives the payment of freights for the shop-owner, and negotiates for cargoes, is a broker. In *Rawlinson v. Pearson*, a pawnbroker was considered by all the Judges to be a broker, and to be subject to the bankrupt laws, although he did not make contracts, but merely received the effects of other persons into his custody in the same manner as a banker did the money of his customer. Are we, then, going farther when we hold a ship-broker to be within the operation of the statute? I should have felt some difficulty if the question had been confined to the 21 Jac. 1, c. 19, where the "receiving other men's estates into their care" is confined to scriveners. But in the next statute relating to bankruptcies, the 5 G. 2, c. 30, the sentence is applied to bankers, brokers, and factors. The words are, "And whereas persons dealing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons: it is hereby further enacted, that such bankers, brokers, and factors shall be, and are hereby declared to be, subject and liable to this and other the statutes made concerning bankrupts." That is, such bankers, brokers, and factors as are intrusted with sums of money and effects belonging to other persons. When we come, therefore, to the new act, and see the same words connected with bankers, brokers, and scriveners, we must hold

that the latter words in the *section apply to all of them. And that appeared to be the view of the Court in *Rawlinson v. Pearson*. As [*707 well, therefore, under the word *broker* as the words following it, I am of opinion that the party in the present case who received commission for finding cargoes for ships, and was intrusted with the receipt of freight, was liable to be made a bankrupt. With respect to the second question, whether there was sufficient evidence that a commission might have issued, it appears to me that the evidence was sufficient. The brother had said, that there were no debts due on their joint estate; but there might be debts on the separate estate of Thomas Baker, and the case falls within the principle of *Lowes v. Lush*, where the Court refused to enforce a contract because the title sold was liable to be questioned under the operation of the bankrupt law.

PARK, J. I am of the same opinion. A ship-broker is, in common parlance, a broker; he negotiates freights, and receives other men's money, and is as much subject to the bankrupt laws as a pawnbroker. *Rawlinson v. Pearson* was a case very fully considered by most eminent judges, and much reliance was placed on the opinion of Lord Hardwicke in *Highmore v. Molloy*, 1 Atk. 206, where a pawnbroker was holden to be a broker. The same point was also established by Wood, B., in a case from the Common Pleas at Lancaster. A ship-broker therefore is a broker within the meaning of the statute; but the sentence "receiving other men's estates into their care or custody" applies as well to the word *brokers* as to the word *scriveners*, which immediately precedes it. For the argument which has been drawn from the 21 Jac. 1, c. 19, vanishes when we consider the language of 5 G. 2, c. 30.

*Upon the second question, I am of opinion that the plaintiff is not bound to take a doubtful title, and the present discussion shows that the [*708 title which the defendants offer is at least doubtful. There was obviously a possibility that Baker might have had separate creditors, and have been liable to a commission at their instance.

GASELEE, J. If there were any doubt on the new statute, it is removed by the language of 5 G. 2, c. 30, because a broker there is described as one intrusted with great sums of money, and with goods and effects of great value belonging to other persons; and the thirty-ninth section enacts, "That such bankers, brokers, and factors shall be and are hereby declared to be subject and liable to this and other statutes made concerning bankrupts." Insurance brokers have also been holden subject to the same law. Upon the second question it is not necessary to say more than that courts of equity will not compel a purchaser to take a doubtful title, and that the present discussion shows there is doubt in this.

BOSANQUET, J. I consider a ship-broker as liable to the bankrupt law within the meaning of 6 G. 4, c. 16: he is employed in negotiating contracts for freight, in receiving money for his principals, deducting commission, and paying over the difference. It has been urged that the sentence "receiving other men's estates into their custody" is confined to *scriveners*, and the 21 Jac. 1, c. 21, has been relied on in support of that argument. But in the 5 G. 2, c. 30, s. 39, the same words are expressly applied to brokers who receive other men's moneys, and the 6 G. 4, c. 16, combines them in one sentence with bankers and scriveners. *Baker therefore, as a broker, or as receiving other men's moneys [*709 into his custody, was liable to the bankrupt laws; and, if so, have the defendants fulfilled their engagement to make out a clear title to the property sold? Seeing that Baker is subject to the bankrupt laws, it rests with them to satisfy the purchaser that no petitioning creditor's debt could be established against him. But when we see that he had made an assignment to his creditors, and that all of them had not executed a release, it is impossible to say that the defendants have made out a clear title to the property in question. The rule which has been obtained must, therefore, be discharged. Rule discharged.

FOSTER and Others v. WESTON. June 25.

Defendants bound themselves by deed to pay 1500*l.* to be delivered to R. D. in goods, by three payments of 500*l.* each, at three, five, and seven months:
Held, that the instrument did not carry interest.

THE plaintiffs sued on the following instrument under seal:—"Sierra Leone, 17th May, 1828. We, Kenneth M'Aulay, Henry Weston, and John Hamilton, do hereby bind ourselves jointly and severally to Messrs. Foster and Smith, of London, for the due and sufficient payment of the sum of 1500*l.* sterling, which amount is to be handed over and delivered to Robert Dargan in goods for sale on their account at the invoice prices with expenses, that is to say, that the goods shall amount to 1800*l.* sterling, calculating that the expenses will amount to 200*l.*, making together 1500*l.* as before stated. Now, the condition of this obligation is such, that the said sum of 1500*l.* is to be duly paid and remitted *710] to Foster and Smith in three equal payments of 500*l.*, at three, five, and seven months from this date. And we, K. M., H. W., and J. H., hereby bind ourselves for the due payment of the same at those periods. In failure of which we acknowledge and hereby render ourselves liable to be sued and proceeded against for the amount. Witness our hands," &c.

The prothonotary having computed and allowed interest on a rule to stay proceedings on payment of the sum due and costs,

Wilde, Serjt., obtained a rule *nisi* for the prothonotary to review his taxation and disallow the interest.

Spankie, Serjt., showed cause. The interest was properly allowed. The rule is, that a party is entitled to interest upon a sum payable at a day certain, or secured by any mercantile instrument. This instrument, though purporting to be a bond, is plainly a mercantile contract; it differs only by the formality of sealing from bills of exchange for the same amount, payable at three, five, and seven months; and the days on which the sums are payable are equally certain. In *Farquhar v. Morris*, 7 T. R. 124, where a bond dated on a day certain in a penal sum, conditioned for payment of a lesser sum generally, without naming any day of payment, was payable on the day of the date, the Court referred it to the Master to compute principal, interest, and costs thereon, and held that interest was due on such bond though not expressly reserved. In *De Havilland v. Bowerbank*, 1 Campb. 50, Lord Ellenborough said, "It appears to me, that interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on *bills of exchange, promissory *711] notes, &c.; or where there has been an express promise to pay interest; or where, from the cause of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made." In *Hogan v. Page*, 1 B. & P. 337, the proceedings were on a single bond, evidently not a mercantile instrument; and in *Higgins v. Sargent*, 2 B. & C. 348,—where it was held, that in covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured were not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.,—the day of payment was uncertain, depending on the life of A. But in *Page v. Newman*, 9 B. & C. 378, the rule was again confirmed, that interest is not payable on money secured by a written instrument, unless it appear on the face of the instrument itself that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. The instrument in that case was rather an agreement than a promissory note, and the sum was payable on a contingency, not on a day certain. And though the rule propounded in *Arnott v. Redfern*, 3 Bingh. 353, was impugned by Lord Tenterden as being somewhat too liberal on the subject of interest, it may be questioned whether the law of Scotland, which that decision upheld, is not more consistent with justice than a practice which enables a debtor, by withholding payment, to deprive his creditor of the use he would have.

been enabled to draw from his money if it had been paid according to the debtor's engagement.

* *Wilde* in support of his rule. This is not a commercial instrument; [*712 nor one in respect of which there has been a usage to allow interest; nor has the obligation any penalty attached to it, out of which a more extensive remedy can be administered by equitable adjustment; one of which ingredients may be found in all the cases in which interest has hitherto been allowed. In *Farquhar v. Morris*, there was a penalty. And in *Gordon v. Swan*, 12 East, 419, Lord Ellenborough limited to bills of exchange, and such like instruments, and agreements expressly reserving interest, the rule as to payments on a day certain, laid down in *De Havilland v. Bowerbank*. In *Slack v. Lowell*, 8 Taunt. 157, the goods were to be paid for by a bill of exchange; and in *Mountford v. Willis*, 2 B. & P. 337, the Court merely refused to reverse a verdict, where a jury had allowed interest on a price to be paid on a given day. But in *Higgins v. Sargent*, Abbott, C. J., said, "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should be adhered to; and if we were to hold that interest was payable in this case, the application of the rule might be brought into discussion in many others." Bayley, J. "It was once the opinion, that money lent carried interest, and in *Calton v. Bragg*, 15 East, 223, it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make of his capital; and that the lender ought, in equity, to be put in the same situation as if he had applied his *principal to his own use. But this Court [*713 held, that interest was not due by law for money lent without a contract for it, expressed, or to be implied from the usage of trade, or from special circumstances. Now, if interest be not due for money lent, which is to be repaid either upon demand or at a given time, it follows that it is not due for money payable within a certain time, after due proof of the happening of a particular event." Holroyd, J. "It is clearly established by the later authorities, that unless interest be payable by the consent of the parties, express, or implied from the usage of trade (as in the case of bills of exchange) or other circumstances, it is not due by common law. Even in *De Havilland v. Bowerbank*, Lord Ellenborough was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right of interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money having been used: and in *Gordon v. Swan*, although the money was payable at a particular day, nonpayment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day."

And in *Page v. Newman*, Lord Tenterden said, "It is a rule, sanctioned by the practice of more than half a century, that money lent does not carry interest."

TINDAL, C. J. There can be little doubt that the party who framed this instrument intended that it should operate as a bond: but it has not that effect; for there is no penalty, and the parties are bound only in the amount which is to be actually paid. It is only *simplex obligatio*, and the question is, Whether, in all cases *in which money is made payable at a day certain, the party [*714 is entitled to interest. The case of *Higgins v. Sargent*, in which, on the death of the party the day became certain, will govern the present; and there are many cases in which sums are payable on a day certain, and yet interest is not recoverable. For instance, rent is reserved payable on a day certain, and yet, where debt or covenant is brought for rent, a jury would not be warranted in giving interest. If it be the intention of the party to obtain interest, it is

always in his power to insert in the contract an express stipulation to that effect. In the present case, there is no stipulation for interest on the face of the contract. The instrument on which it is sought to recover it is not a commercial instrument, nor one on which there has been any usage to allow interest. We ought not to break into the rule, which is now well understood, and therefore this rule must be made absolute.

PARK, J. I do not say that the law of Scotland on this point is not wise, and there certainly has been a diversity of practice here; but the question is, What is the rule now established. Two reasons have been urged for allowing the plaintiffs interest here; the first, that the sums are payable on a day certain; and, secondly, that this is a mercantile contract. I think this is not a mercantile contract. And as to the argument deduced from the payment on a day certain, it is answered by the cases which have been alluded to, particularly *Higgins v. Sargent*. There it was held, that in covenant upon a policy of insurance upon the life of A., payable six months after due proof of his death, the assured were not entitled to recover interest upon the principal sum insured, from the expiration of six months after due proof of the death of A.

*715] In the other case of *Page v. Newman*, the rule was *most accurately laid down by Lord Tenterden, and it ought to be uniform in all the courts till the legislature shall have altered it.

GASELEE, J. In early periods of the law we find the decisions on this point conflicting, but according to the practice of late years, this is clearly not a case in which interest can be allowed.

BOSANQUET, J. I am of the same opinion. Exceptions to the rule for the allowance of interest ought not to be unnecessarily multiplied. There is no stipulation here for interest on the face of the contract. The instrument is not a mercantile instrument, though perhaps originating in a mercantile transaction: nor is it one on which there is any usage for the allowance of interest.

Rule absolute

*716]

*DAVIS v. GARRETT.

Plaintiff put on board defendant's barge, lime, to be conveyed from the Medway to London.

The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire thereby, the whole was lost: Held, that the defendant was liable, and the cause of loss sufficiently proximate to entitle plaintiff to recover under a declaration alleging the defendant's duty to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation.

2. The law implies a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual course.

THE declaration stated, that theretofore, to wit, on the 22d day of January, 1829, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap, the plaintiff, at the special instance and request of the defendant, delivered to the defendant on board a certain barge or vessel of the defendant called the *Safety*, and the defendant then and there had and received in and on board of the said barge or vessel from the plaintiff a large quantity, to wit, 114½ tons of lime of the plaintiff of great value, to wit, of the value of 100*l.*, to be by the defendant carried and conveyed in and on board the said barge or vessel from a certain place, to wit, Bewly Cliff in the county of Kent, to the Regent's Canal in the county of Middlesex, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever excepted, for certain reasonable reward to be therefore paid by the plaintiff to the defendant: that the said barge or vessel afterwards, to wit, on, &c., at, &c., departed and set sail on the intended voyage, then and there having the said lime on board of the same to be carried and conveyed as aforesaid, except as aforesaid, and it thereby then and there became and was the duty of the defendant to have carried and conveyed the said lime on board of the said barge

or vessel from Bewly Cliff to the Regent's Canal, the act of God, and such other matters and things excepted, as were above mentioned to have *been [717] excepted, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same: but the defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the plaintiff in that respect, did not carry or convey the said lime on board of the barge or vessel from Bewly Cliff aforesaid to the Regent's Canal, although not prevented by the acts, matters, or things excepted as aforesaid, or any of them, by and according to the direct, usual, and customary way and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same, but on the contrary thereof, afterwards, and before the arrival of the said barge or vessel as aforesaid at the Regent's Canal, the defendant by one John Town, the master of the said barge or vessel, and the agent of the defendant in that behalf, to wit, at, &c., without the knowledge and against the will of the plaintiff, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage, with the said barge or vessel so having the said lime on board of the same, to certain parts out of such usual and customary course and passage, to wit, to a certain place called the East Swale, and to a certain place called Whitstable Bay, and did then and there voluntarily and unnecessarily carry and navigate the said barge or vessel with the lime on board thereof as aforesaid to the said parts out of such usual and customary course and passage as aforesaid, and delay and detain the said last-mentioned barge or vessel with the lime on board thereof, for a long space of time, to wit, for the space of twenty-four hours then next following: and the said barge or vessel so having the said lime on board of the same, was by reason of such deviation and departure, and delay and detention *out of such usual and customary course and passage, and before her [718] arrival at the Regent's Canal aforesaid, to wit, on, &c., at, &c., exposed to and assailed by a great storm and great and heavy sea, and was thereby then and there wrecked, shattered, and broken, and by means thereof the said lime of the plaintiff so on board the said barge or vessel as aforesaid, became and was injured, burnt, destroyed, and wholly lost to the plaintiff, to wit, at, &c., whereby the plaintiff lost divers great gains, profits, and emoluments, amounting to a large sum of money, to wit, the sum of 50*l.*, which he might and otherwise would have made thereby, to wit, at, &c.

At the trial before Tindal, C. J., London sittings after Michaelmas term last, it appeared, that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of violent and tempestuous weather, the sea communicated with the lime which thereby became heated, and the barge caught fire; and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

A verdict having been found for the plaintiff,

Taddy, Serjt., obtained a rule *nisi* for a new trial, or to arrest the judgment, on the ground, first, that the deviation by the master of the barge was not a cause of the loss of the lime sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course; and, secondly, that the declaration contained no allegation of any undertaking on the part of the defendant to carry the lime directly *from Bewly Cliff to Regent's Canal; an allegation [719] which, it was contended, on the authority of *Max v. Roberts*, 12 East, 89, was essential to the plaintiff's recovery.

Wilde, Serjt., showed cause. If the deviation was a breach of the master's duty, the loss is sufficiently proximate. But the deviation was a breach of duty, because in the contract to carry the plaintiff's lime from Bewly to the Regent's Canal, it is an implied condition that for the purpose of avoiding unnecessary

delay, the lime shall be carried in the usual and direct course. The exception of perils of the seas and navigation, &c., applies only to perils incurred in the direct and usual course; and of perils encountered out of that course the defendant must take on himself the responsibility. So, upon policies of insurance, if a loss happen during a deviation, it is not a loss within the meaning of the policy, and the underwriter is exonerated. So, if a party direct a horse to be led by a given road, and the conductor chooses to proceed by a different track, he will be responsible for any injury the horse may sustain.

With respect to the objection to the declaration, it may be admitted, for the purpose of argument, that the action is *ex quasi contractu*, and that it cannot be ascertained what was the duty of the defendant, unless the contract be stated out of which that duty is alleged to arise. But there is no ground in this case for the objections taken to the declaration in *Max v. Roberts*. There the count stated that the defendants being owners of a ship at Liverpool, bound on a voyage from thence to Waterford, the plaintiff shipped goods on board, to be *720] carried upon the said voyage by the defendants, and *to be delivered at Waterford to the plaintiff's assigns; whereupon the plaintiff insured the goods at and from Liverpool to Waterford; that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from Liverpool to Waterford without deviation; and alleged as a breach of such duty their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff, by reason of such deviation, lost his goods and the benefit of his policy, &c. It was held that the count could not be sustained for want of alleging that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment, from whence a promise or duty, founded upon an agreement to carry the goods, might be inferred; and also for want of an allegation that the defendants undertook to carry the goods directly to Waterford from Liverpool; for though the ship's ultimate destination might be Waterford, yet she might have been first destined to other places on a coasting voyage.

In this declaration it is distinctly alleged that the defendant had received the lime in and on board of his barge to be by him carried and conveyed from Bewly to the Regent's Canal; and though it is not alleged that the defendant undertook to carry the lime directly to the Regent's Canal, it is averred that it was his duty to carry it by and according to the direct usual and customary way, course, and passage, without any voluntary and unnecessary deviation and departure; and the breach is alleged in deviating unnecessarily from the usual and customary way.

Taddy. The cause assigned for the loss of the lime is too remote to entitle *721] the plaintiff to sue. In *jure causa proxima non remota spectatur*; but here the alleged cause of the loss is many removes from the accident. The master deviated; by deviation he was exposed to a storm; the storm wetted the lime; the lime caught fire from the wetting; the barge caught fire from the lime; the barge sunk; and the lime perished. If the deviation be holden the cause of the loss here, there is no foretelling to what link in the chain of causation plaintiffs may ascend hereafter. But it cannot be averred with certainty that the deviation was even the remote cause of the loss; for the barge might have encountered, and probably would have encountered, the same storm if she had proceeded in a direct course.

At all events, the declaration should have alleged, on the part of the defendant, an express undertaking to carry the lime by the direct course; for he might have shown that no such undertaking existed; that he was accustomed, as carriers are wont, to call at places somewhat out of the direct course, for the convenience of his general business, and that the plaintiff had consented to send his goods by such course as the carrier usually pursued. The only undertaking that can fairly be implied, on the part of the defendant, is to convey the goods carefully and in reasonable time; he is not bound to pursue any particular course; but, in that respect, to consult his own convenience. If there were

any express contract to bind him to a stricter performance, it ought to have been truly stated, that it might be seen what duty resulted from it. In the older forms of action against a carrier, the expression is *suscepit*, which shows that the action against him is *ex contractu*, per Denison, J., 1 Wils. 282, and governed by all the principles which apply to an action of contract. *Max v. Roberts*, therefore, is in point; and if the declaration there was ill *because it did not aver an express undertaking by the defendant to carry [*722 the goods *directly* to Waterford, the present declaration is equally defective for not averring an undertaking to carry the goods directly to the Regent's Canal. In *Powell v. Layton*, 2 N. R. 365, Mansfield, C. J., said, "The word *duty* is introduced into this declaration; but let us see what is meant by the defendant's duty. How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant, and the duty of an officer, I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract." *Cur. adv. vult.*

TINDAL, C. J. There are two points for the determination of the Court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the Court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is not rested, as indeed it could not be rested, on the *particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case. [*723

But the objection taken is, that there is no natural or necessary connexion between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker v. James*, 4 Campb. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby *ensued; and yet the defendant in that case would undoubtedly [*724 be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attri-

butable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done ; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of *Max v. Roberts*. The first ground of objection upon which the judgment for the defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged, that the defendant had and received the lime in and on board of his barge, to be by him carried and conveyed on the voyage in question.

As to the second objection mentioned by the learned Lord, in giving the judgment in that case, viz. that there is no allegation in the declaration that there was an undertaking to carry *directly* to Waterford, it is to be observed, that this is mentioned as an additional ground for the judgment of the Court, after one, in which it may fairly be inferred from the language of the Chief Justice that all the Judges had agreed ; and which first objection appears to us amply sufficient to support the judgment of the Court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of the Court. And at all events, we think there is a distinction *725] between the *language of this record and that of the case referred to.

In the case cited, the allegation was, that it was the duty of the defendant to carry the goods *directly* to Waterford ; but here the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation and departure."

The words *usual and customary* being added to the word *direct*, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word *direct*, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that her voyage.

And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the plaintiff.

Rule discharged.

*726] *LANCASTER and another v. CHRISTOPHER HARRISON. *June 22.*

Defendant drew bills as surety for the acceptor C. H., and it was provided by a deed, to which plaintiff, the holder of the bills, as well as the defendant, was a party, that he should not sue defendant on the bills till C. H.'s effects should have been sold, and the proceeds applied in discharge of the bills.

C. H.'s effects were seized and sold under a commission of bankruptcy, the trustees to whom they had been conveyed by the deed in question having, with the knowledge and assent of the defendant, omitted to take possession of them in time :

Held, that the plaintiff was not barred from suing the defendant on the bills.

THIS was an action on several bills of exchange drawn by the defendant, accepted by his brother Charles Harrison, and endorsed to the plaintiffs.

Charles Harrison being considerably indebted to the plaintiffs, by indenture made the 20th of February, 1828, between himself of the first part, the defendant of the second, the plaintiffs of the third, and Thomas Borrett of the fourth, (reciting that the plaintiffs had agreed to discount for Charles Harrison bills of exchange to the amount of 700*l.* drawn by the defendant upon, and accepted by Charles Harrison ; that Charles Harrison owed the plaintiffs 500*l.* for wine ; and that he had agreed to assign the lease of a house in Russell Street, with the furniture, fixtures, and other effects in and about the same, for the purpose of

securing to the plaintiffs the payment of the 500*l.*, of the bills of exchange which had been discounted, and any other drafts or bills to be thereafter paid, so as the moneys recoverable under the security should not exceed 1000*l.* assigned to Thomas Borrett the lease of the house in Russell Street, and all the furniture, fixtures, and effects therein, upon trust, that at the request of the plaintiffs, Borrett should sell the lease and furniture by public auction or private contract, and apply the proceeds, first, in defraying the expenses of executing the trust, and then in paying and satisfying the plaintiffs the 500*l.* due for wine, the 700*l.* due on the bills of exchange, and the sum to become *due on any other drafts or bills which the plaintiffs might thereafter discount or pay for [727 Charles Harrison, with interest on the same; and it was provided, that the premises thereby assigned should be sold or offered for sale, and the produce thereof, if sold, be applied in the manner and for the purposes specified in the deed, before any proceedings should be commenced by the plaintiffs, or any subsequent endorsees of the bills of exchange, against the said Christopher Harrison, his executors, &c., to compel payment of the bills, or any of them, and that no proceedings should be had on the bills unless no person should be willing to purchase the premises, or the produce, after such deductions as aforesaid, should be insufficient to discharge the amount of the bills and interest, and expenses thereon.

The defendant knew that his brother was considerably embarrassed, but he was allowed to remain in possession of the premises. His affairs becoming more desperate, the plaintiffs, in January 1829, seized the effects in the house under an execution in an action against him on one of the bills he had accepted. At his earnest request, however, the sale was postponed, and the officer continued in possession till the 15th of April following, when the goods were claimed under a commission of bankruptcy issued against him in the interval, and the plaintiffs withdrew their execution.

It appeared by a letter from the defendant to the plaintiffs, dated April 20th, 1829, that he was aware of all these circumstances from the beginning, and also that three loads of furniture had been removed from the premises, on the assertion that they belonged to a lady who lodged in the house, though the defendant expressed his belief that she was entitled to no more than one load.

After the commission of bankrupt had issued, Borrett attempted to take possession of the premises, but in vain.

*The goods and fixtures were sold by the assignees under the commission for 251*l.*, and the lease for 10*l.* The 10*l.* they paid over to the [728 plaintiffs, and retained the rest; whereupon the plaintiffs commenced this action against the defendant as drawer of the bills to the amount of 900*l.* and upwards.

At the trial before Tindal, C. J., London sittings after last Hilary term, it was objected on the part of the defendant, that, according to the provision of the deed of February 20, 1828, the plaintiffs had no right to sue the defendant on the bills till the fixtures and furniture had been put up for sale by Borrett, and the proceeds of them had been paid to the plaintiffs; and that the sale by the assignees under the commission of bankrupt, and the payment of the proceeds to Charles Harrison's creditors at large, was no compliance with the terms of that proviso.

The Chief Justice, however, thought that this was no answer to the action in a court of law, and that the defendant's remedy was in a court of equity, if there had been any fault in his trustee.

A verdict, therefore, was taken for the plaintiffs for 941*l.* 18*s.* 6*d.*, with leave for the defendant to move to enter a nonsuit instead.

Wilde, Serjt., having accordingly obtained a rule *nisi* to that effect, on the ground urged at the trial,

Taddy, Serjt., showed cause. (*Goulburn*, Serjt., was with him.) The proviso in the deed does not amount to a general covenant not to sue: it could not be pleaded in bar as such, or as a release; and if so, although it may afford ground for a cross action, it is no defence to the present. But the proviso is

not confined to a sale by Borrett, and the object of it was merely to prevent the defendant from being called on till it should have *been ascertained that
 *729] Charles Harrison was without funds to defray his debts; and that has been established by the actual sale of his effects as required.

It was the defendant's own laches that Borrett did not take possession of the effects, and dispose of them for the benefit of the defendant as soon as the deed of February 1828 was executed. From his letter of April 1829, it is manifest he knew and assented to all that was going on, with a view to serve his brother; and he cannot now object that that has not been done, which has been omitted through his own indulgence or neglect.

Wilde. The defendant is only a surety, and is entitled to the strict observance of the proviso in the deed. That proviso was introduced for his benefit, and not for the benefit of Charles Harrison's creditors at large; and it expressly stipulated, that the defendant shall not be proceeded against, not only till Charles Harrison's effects have been sold, but till the proceeds have been paid to the plaintiffs, and found insufficient to satisfy the bills. There has been no performance of this part of the condition; for the plaintiffs received only 10%, the proceeds of the lease, and nothing in respect of the fixtures or furniture. Till the proceeds of the latter have been found insufficient, the action against the defendant is premature, as in *Tatlock v. Smith*, 6 Bingh. 339. The sale contemplated by the proviso was a sale by Borrett for the benefit of the plaintiffs, and not a sale under a commission of bankrupt for the benefit of creditors at large. The plaintiffs should have called on Borrett to sell. The neglect is in them.

TINDAL, C. J. The question in the cause depends on the construction of the
 *730] proviso in the deed of February *20th, 1828. It appears that Christopher Harrison is only a surety: he is a party to the deed; and by the proviso at the end it is stipulated that the premises thereby assigned shall be sold, or offered for sale, and the produce thereof, if sold, be applied in the manner and for the purposes specified in the deed, before any proceedings shall be commenced by the plaintiffs, or any subsequent endorsers of the bills of exchange, against the said Christopher Harrison, his executors, &c., to compel payment of the bills, or any of them, and that no proceedings shall be had on the bills unless no person shall be willing to purchase the premises, or the produce, after such deductions as aforesaid, shall be insufficient to discharge the amount of the bills and interest and expenses thereon: and it has been contended that this proviso operates as an agreement on the part of the plaintiffs not to sue the defendant upon the bills, till all the particulars specified in the proviso have been complied with.

If we take the proviso according to the letter, it has been complied with. For the defendant has not been sued till the premises have been put up for sale, and the produce has been found insufficient to satisfy the plaintiffs' demand. But it is contended, that the sale which has taken place is not such a sale as was contemplated by the agreement; that the sale ought to have been a beneficial sale by Borrett, the trustee in the deed, for the sole purpose of discharging the bills, instead of a compulsory sale by the assignees of Charles Harrison, who have carried off all the proceeds to be distributed among his creditors. That may be a ground of complaint against Borrett, who was a trustee for all parties for the purposes expressed in the deed, but it is no answer in law to an action on the bills. If the defendant have yet any remedy on this deed, it must be by application to another court to enjoin the plaintiffs not to proceed.

*731] *GASELEE, J. (a) I am satisfied that there is no ground for making absolute this rule to enter a nonsuit, because the agreement entered into by the plaintiffs does not amount to a general covenant not to sue, and, therefore, could not be pleaded as a release. In *Dean v. Newhall*, 8 T. R. 168, it was holden, that if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in

bar, he may still sue the other obligor. And a passage is cited with the concurrence of Lord Kenyon, from 12 Mod. 351, that "if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release, but a covenant; because he covenants only not to sue A., but does not covenant not to sue B.; for the covenant is not a release in its nature, but only by construction to avoid circuity of action."

I do not concur in thinking that the defendant is to blame for the trustee's omission to sell, but I am satisfied there is no ground for entering a nonsuit.

BOSANQUET, J. I am of opinion that the terms of the proviso in the deed offered no defence to this action. It is an agreement not to proceed against the defendant under certain circumstances, but does not amount to a general covenant not to sue, and could not be pleaded as a release.

If there be anything wrong in the conduct of the trustee, that must be the ground of application to another court. Rule discharged.

*COCKBURN v. LING. June 23.

[*732

Where a defendant was allowed time to answer plaintiff's affidavit impeaching the sufficiency of defendant's bail, he was not allowed to put in fresh bail instead of answering the affidavit, although his time for putting in bail had not expired, nor any attachment been issued against the sheriff.

THIS was a country cause in which bail were to be justified by affidavit: the affidavits were sent up on the 14th of this month, although the defendant had till the 26th to put in bail above. On the 18th the plaintiff having put in affidavits which impeached the sufficiency of the proposed bail, the defendant was allowed till this day, the 23d, to answer the matter alleged, without prejudice to the plaintiff's proceedings.

The defendant, however instead of answering the affidavits, now proposed to put in fresh bail, whom

Andrews, Serjt., moved to reject.

Stephen, Serjt., contended, that the defendant was entitled to put in fresh bail till the 26th, especially as the sheriff had not been ruled to bring in the body, and was not yet liable to any attachment. The rejection of the bail now offered would only cast upon the defendant the unnecessary expense of discharging an attachment against the sheriff. But

The Court said the defendant was in the same situation as if his bail had been in the box and rejected upon examination. Time had been allowed him, as an indulgence, to answer the plaintiff's affidavit: he was bound to apply the time to that purpose, and not to the purpose of procuring other bail, by which in effect he admitted he had no answer to the plaintiff's affidavit. That although it was to be regretted the defendant had exposed himself to the expense of an attachment, the rule of the Court must be adhered to in order to induce parties to put in sufficient bail in time.

*ALCOCK v. COOK. June 23.

[*733

The Court will not, in a transitory action, change the *venue* on account of the expense of trying the cause in the county where the *venue* is laid, unless the expense of trying it there greatly preponderates.

THIS was an action of trover, to try the right to wreck on a portion of the coast of Lincolnshire. The plaintiff having laid his *venue* in London,

Adams, Serjt., obtained a rule *nisi*, to remove the *venue* to Lincolnshire, on

the ground that almost all the witnesses conversant with the matter resided in that county; that several of them were exceedingly aged; that one in particular, who had given his testimony upon a former trial, could not be removed without danger, and that the expense of trying the cause in London would be enormous.

Wilde, Serjt., showed cause on affidavits, which stated that the plaintiff's case rested mainly on documentary evidence, which might be produced in London at little expense, but which it would be both difficult and expensive to prove by proper witnesses in Lincolnshire.

Adams offered to make admissions as to sundry of the documents.

Sed per curiam. The general rule is, that in transitory actions the plaintiff has a right to lay his *venue* where he pleases, and the courts only interfere on special grounds, as where it is not likely that an impartial trial can be had, or the expense of witnesses greatly preponderates on one side. The present is a mixed case; and where the expense will be great on both sides, we cannot upon every occasion undertake to try the balance of inconvenience.

*734] *We, therefore, discharge the rule, but think it right to impose upon the plaintiff the terms of permitting the evidence of the old witness, who cannot be removed, to be read from the Judge's notes of the former trial.

Rule discharged accordingly.

CRAVEN and Others, Assignees of WILLIAM and BENJAMIN ALRED, Bankrupts, v. EDMONDSON. June 28.

A payment by a partner who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy, to a creditor who has notice of the act of bankruptcy, is not protected by s. 82, of 6 G. 4, c. 16.

ASSUMPSIT. The declaration contained counts, 1st, for money had and received to the use of the bankrupts; 2dly, to the use of the plaintiffs, as assignees of the bankrupts; and, 3dly, to the use of Benjamin Alred jointly with the plaintiffs, as assignees of William Alred.

At the trial, last York assizes, it appeared that the defendant had supplied the bankrupts on their joint account, with wool to the amount of 92*l.*, and pressed for payment; whereupon the debt was, in the month of October 1829, settled by William Alred, who had just before committed an act of bankruptcy, of which the defendant had notice. Benjamin Alred did not commit any act of bankruptcy till some days after.

The commission was dated the 2d November, 1829

A verdict having been found for the plaintiffs,

Jones, Serjt., pursuant to leave reserved at the trial, moved to set it aside, and enter a nonsuit instead, on the ground that the payment having been made before the assignees' title to the joint property of the bankrupts was completed, *735] they were not in a situation to sue for *the amount; and that at all events the payment was protected by the eighty-second section of 6 G. 4, c. 16, which enacts, that payments *bonâ fide* made by any bankrupt before the date and issuing of the commission, shall be deemed valid notwithstanding any prior act of bankruptcy, provided the person dealing with the bankrupt had not at the time of such payment notice of any act of bankruptcy by such bankrupt committed.

The payment having been made to the defendant in respect of a debt due from both the bankrupts, the notice of an act of bankruptcy, in order to invalidate the payment, ought to be notice of an act committed by both such bankrupts.

A rule *nisi* was granted, against which

Wilde, Serjt., showed cause. The action lies, and the declaration is sufficient; at all events, the set of counts which alleges the money to have been received to

the use of Benjamin and the assignees of William. *Smith v. Goddard*, 3 B. & P. 469. And notice of the act of bankruptcy by William, sufficiently brings this case within the proviso of the eighty-second section of 6 G. 4; for William being bankrupt, the assignees were in his place partners with Benjamin, and William was without authority to dispose of the partnership funds. *Thomason v. Frere*, 10 East, 418, *Graham v. Robertson*, 2 T. R. 282. In *Smith v. Goddard* the payment was made by an agent of the solvent partner, and, therefore, by one who had authority; so likewise in *Fox v. Hanbury*, Cowp. 445.

Jones. The authority of a partner is not, by his committing an act of bankruptcy, rescinded as to engagements and debts incurred before the act of bankruptcy. He loses only his authority to enter into new engagements. [736] The solvent partner retains his authority; and, as to past engagements, may continue to act as agent for the bankrupt partner: *Fox v. Hanbury*: if so, the bankrupt partner is, as to such engagements, agent also for the solvent partner; otherwise their rights and responsibilities are not reciprocal. In *Harvey v. Crickett*, 5 M. & S. 337, a payment made by the bankers of a firm, after one of the firm had committed an act of bankruptcy, was holden a valid payment; though the bankers must have been agents as well for the bankrupt as the solvent partner. And in *Lacy v. Woolcot*, 2 D. & R. 458, a bill of exchange, accepted for a firm by one of the partners after he had committed an act of bankruptcy, was holden an available instrument in the hands of an innocent endorsee. Therefore it may be contended, that the eighty-second section applies only to the case of sole traders; a partner who has committed an act of bankruptcy being, as to past engagements, agent for the solvent partner, and it being indifferent by what hand such solvent partner makes the payment.

TINDAL, C. J. This was an action to recover a sum of money paid by William Alred after an act of bankruptcy, being the amount of a debt due to the defendant from William Alred and his partner Benjamin, who remained solvent. And the question is, Whether, upon proof that the defendant knew of the act of bankruptcy, this sum can be recovered by the assignees of the two partners. If there had been no partner, the case would have fallen directly within the eighty-second section of 6 G. 4, c. 16, which, after enacting—"That all payments really and *bonâ fide* made, or which shall hereafter be made by [737] any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bankrupt before the issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt;—" goes on,—“provided the person so dealing with the same bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.”

It has been contended, that this section applies only to sole traders, and not to the case of a firm, where any of the partners continue solvent. But no authority has been cited for such a position: and in whom was the property in the moneys vested at the moment of the payment? William having committed an act of bankruptcy, one moiety of it belonged to his assignees, the other moiety to Benjamin. By what right, then, could William make over the moiety of Benjamin? It has been contended he was the agent of Benjamin. But the act of bankruptcy, which made his assignees and Benjamin tenants in common, dissolved the agency as to the property of such tenancy in common. In some cases, and for some purposes, particularly in favour of a party who has no notice of the act of bankruptcy, the agency may, perhaps, be said to continue; as under the circumstances stated in *Woolcot v. Lacy*: but here the defendant had notice of the act of bankruptcy; and he must have known that the agency of William was destroyed, or capable of being destroyed, by a subsequent

*738] *commission. The money, therefore, belongs to the assignees, and this rule must be discharged.

PARK, J., and GASELEE, J., concurred.

BOSANQUET, J. I am of the same opinion. From the time of the act of bankruptcy, William ceased to have any interest in the partnership funds, and could not make any payment for Benjamin.

The payment by William on his own account is not protected, because the party had notice of his bankruptcy. And with respect to Benjamin, the payment was not made by him, nor on his behalf, for the reason already given.

Rule discharged.

GOULD, Assignee of SERJEANT, a Bankrupt, *v.* SHOYER. June 29.

A purchaser of property under a commission of bankrupt which is afterwards superseded by a creditor, is not protected by s. 87, of 6 G. 4, c. 16, from a claim at the suit of the assignees under a subsequent commission.

TROVER for a lease.

The defendant had purchased the lease from the assignees of Shoyer, under a commission of bankrupt sued out against him June 27, 1827. In the November following, one Martha Gale presented a petition to supersede this commission, which was accordingly superseded at her instance, the bankrupt himself taking no steps in the business.

The plaintiff in the present action was assignee under a subsequent commission.

At the trial before Bosanquet, J., last Somerset assizes, a verdict was found for the plaintiff, with leave for the defendant to move to set it aside and enter a
*739] nonsuit, if the defendant's purchase were protected under the *6 G. 4, c. 16, s. 87, which enacts "That no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or on any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof."

Merevother, Serjt., obtained a rule *nisi* on that and other grounds, which it is not material to state here.

Wilde and *Stephen*, Serjts., showed cause. The eighty-seventh section applies only to proceedings by the bankrupt himself, and was intended to prevent him from impeaching titles, unless he commences proceedings on a *supersedeas* within twelve months from the date of his commission.

The assignees on the second commission do not claim *under* the bankrupt, strictly speaking, but adversely to him, by operation of law—the commission being a kind of statutory execution. *Doe v. Bevan*, 3 M. & S. 153. They claim in the *post*, not in the *per*. The object was to protect purchasers under an existing commission, not, to make available a commission superseded; otherwise *bona fide* creditors might be injured by sales under a fraudulent commission, which the bankrupt might collusively abstain from impeaching. If the legislature had designed to estop the creditors as well as the bankrupt from impeaching proceedings, such an intention might have been indicated by the insertion of the single word *creditors*. But ss. 92, 94, and 78, contain provisions incompatible with the supposition of any such intention.

*740] **Merevother*. In common parlance, assignees claim under a bankrupt, and it must be presumed that the legislature employs words in their ordinary sense, and not with a confined and technical meaning. It will be a great hardship on purchasers, to invest money on the sanction of a commission, and to be turned out of possession, perhaps, after expensive improvements

That is a hardship which the Court of Chancery has always interfered to prevent; *Ex parte Milner*, 19 Ves. 204; and it can scarcely be supposed the legislature would sanction a mischief which a court of equity would redress. It is impossible for a purchaser to know whether a commission will turn out to be valid or not, and the eighty-seventh section will be almost nugatory if it be not held to protect every purchase under a commission. A contrary decision must have a very mischievous effect upon sales under commissions, by deterring bidders, and lowering the price of the property to be sold. The property having been paid for, the creditors are not injured: the evils which may possibly arise from occasional fraud in bankrupts are of a less serious nature, and can never be completely guarded against. Therefore, by s. 92, depositions are made conclusive in all cases, unless the commission be disputed within a certain time. *Cur. adv. vult.*

TINDAL, C. J. The only point upon which the Court entertained any doubt, was that which was last urged on the part of the defendant, viz., whether the defendant, who had purchased the lease from the assignees of the bankrupt under a commission issued in 1827, which was afterwards superseded on the petition of a creditor, was protected, under the eighty-seventh section of the bankrupt act, against the present action, brought to *recover the same [741] lease, by the assignees under a second commission.

The eighty-seventh section contains a provision entirely new to the bankrupt law; in order, therefore, to judge of the extent and operation of that section, it should be considered what were the mischiefs at that time experienced.

By superseding a commission, everything done under it was considered to be void whilst the writ of *supersedeas* remained in force; all titles to real or personal property purchased from the assignees were defeated; all payments made to, and all acts done by, them were held to be void.

But as no *supersedeas* could be obtained except by application to the great seal, it was in the discretion of the Chancellor to refuse to grant a *supersedeas*, either at the prayer of the bankrupt, or even with the consent of all the creditors, where *bonâ fide* purchasers were in possession of any part of the bankrupt's property, by purchase under the commission, unless the bankrupt elected to confirm the purchases under which they claimed. *Ex parte Milner*, 19 Ves. 204. Buck. 67.

No real or substantial injury could therefore be effected by a writ of *supersedeas*; because notice of the application must be given to all parties concerned; the Chancellor would hear all whose interests were affected; he would direct an issue where he felt doubt as to the propriety of the application, and would only grant the application upon terms which would insure the just rights of all.

But there was another mode in which the bankrupt might question the titles of others, without any application to the Chancellor; and that was, by bringing an action at law, and by proving, in the language of the *eighty-seventh [742] section, "a defect in the suing out of the commission, or in any of the proceedings under the same;" in which case *bonâ fide* purchasers might be deprived of their purchases without any remedy whatever.

In order to prevent this mischief, and this only, as it appears to us, was the eighty-seventh section framed; the object of which was, to take away the power of the bankrupt to question titles, unless where he commenced proceedings to supersede the commission, and duly prosecuted the same within twelve months; thus at once limiting the bankrupt to the period of a year within which he must apply for the *supersedeas*, and restraining him to that course in which it was well known the Lord Chancellor would provide that he should not question the titles of those who were *bonâ fide* purchasers under the commission.

The eighty-seventh section, therefore, appears to us to have been framed for a purpose quite different from that of operating as a restraint on the assignees under a second commission, and it contains no provision to that effect. There can, therefore, be no reason for extending the words, "claiming under the bankrupt," beyond their strict meaning, that is, persons claiming as purchasers, devisees, heirs, or personal representatives; the assigns not claiming in strict-

ness *under* the bankrupt, but adversely to him, and by operation of law. If the defendant had any just title to protection, he might have appeared before the great seal when the creditor obtained the *supersedeas* of the former commission, and no doubt he would have received protection from this action.

Rule discharged.

*743]

*MILES *v.* CATTLE and Another. *June 28.*

Plaintiff received a parcel from G. to book for London at the office of defendants, common carriers. Plaintiff, instead of obeying his instructions, put the parcel into his bag, intending to take it to London himself. The defendants having lost the bag, held, that the plaintiff could not recover damages from them in respect of the parcel.

CASE against a carrier for negligence.

The first count of the declaration stated, that the defendants, before and at the time of committing the grievances thereafter next mentioned, were owners and proprietors of a certain common stage-coach for the carriage and conveyance of passengers and their luggage from Stockton to York for hire and reward to them the defendants in that behalf, to wit, at, &c. : and the defendants, being such owners and proprietors, thereupon, therefore, to wit, on, &c., at, &c., the plaintiff, at the special instance and request of the defendants, became and was a passenger in the same coach, to be safely and securely carried and conveyed thereby, together with his luggage, from Stockton to York, for a certain fee and reward to the defendants in that behalf : and the defendants then and there received the plaintiff as such passenger, together with his luggage, to wit, a certain bag containing divers goods and chattels, to wit, ten coats, &c., of great value, to wit, of the value of 50*l.*, and a certain note of the Governor and Company of the Bank of England, commonly called a bank-note, for the payment of 50*l.*, and of the value of 50*l.*, of the said plaintiff : and thereupon it then and there became and was the duty of the defendants to use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by and upon the said coach from Stockton to York : yet the defendants, not regarding their duty in that behalf, did not use due and proper care that the plaintiff and his luggage should be safely and securely carried and conveyed by

*744] *and upon the said coach from Stockton to York, but wholly neglected so to do ; and so carelessly and negligently conducted themselves with respect to the said luggage of the plaintiff, that the same, by and through the carelessness and negligence of the defendants in that behalf, became and was totally lost to the plaintiff, to wit, at, &c. The second count stated, that the plaintiff, at the request of the defendants, had delivered to them a bag containing (as before), to be carried to York, which it was the defendants' duty to take care of, and yet it was lost through their negligence. The third and fourth were not materially different ; and the fifth alleged that the defendants were keepers of a certain coach-office for the reception and safe custody of the luggage of passengers for hire, coming to or going from the coach-office by any coach for the conveyance of passengers for hire whereof the defendants were proprietors ; that the plaintiff afterwards, to wit, on, &c., came to the coach-office as a passenger for hire from Stockton in and by a certain coach for the conveyance of passengers for hire, whereof the defendants then were proprietors, with certain luggage of him the plaintiff, to wit, a certain other bag containing (as before), and thereupon, then and there, at the special instance and request of the defendants, caused the last-mentioned bag, with the contents thereof, to be placed in the coach-office, to be safely and securely kept for the plaintiff by the defendants, who then and there received the same for the purpose aforesaid ; whereupon it then and there became and was the duty of the defendants to use due and proper care in the keeping and taking care of the last-mentioned bag of the plaintiff, with the contents thereof : yet the defendants, not regarding their duty in that behalf, took

such bad care of the last-mentioned bag, and contents thereof, and so carelessly and negligently conducted themselves in that *behalf, that the last-mentioned bag, with the contents thereof, afterwards, to wit, on, &c., by and through the carelessness and negligence of the defendants, became and was wholly lost to the plaintiff, to wit, at, &c. [*745]

At the trial before Park, J., York Lent assizes, it appeared that the defendants were proprietors of a coach running between Stockton and York. The plaintiff, having occasion to go to London, took a place in the coach from Stockton to York, intending when at York to proceed by the mail to London. He had with him in the coach a cloak, and a bag, labelled, "T. Miles, passenger," containing clothes worth about 15*l*. Previously to his setting out from Stockton, one Garbut delivered to him a parcel containing a 50*l*. bank-note, addressed to an attorney residing in London, which parcel Garbut desired the plaintiff to book at the defendant's office at Stockton, and forward by the defendants to London. The plaintiff, instead of doing this, put the parcel into his own bag, intending to convey it to London himself. The carriage of the parcel, if it had been sent by the defendants, would have cost 4*s*. 6*d*. When the plaintiff arrived at York he got off the defendants' coach without attending to his luggage, walked away, and was absent about two hours. On his return to the office at which the defendants' coach had stopped and had been unloaded by the defendants' porter, the plaintiff found his cloak, but was never able to obtain any tidings of his bag.

A verdict was found for the plaintiff for 15*l*., with leave for him to move to increase it to 65*l*., if under the circumstances the Court should think him entitled to recover in respect of the 50*l*. note.

Wilde, Serjt., accordingly obtained a rule *nisi* to that effect, and

**Cross*, Serjt., obtained a rule *nisi* for a new trial, provided the Court should make the first rule absolute. [*746]

Cross now showed cause against the rule for increasing the damages, and proposed to show that the plaintiff ought not to recover the 15*l*., much less the 65*l*., the bag having been in his own custody as a passenger, and having been lost by his own carelessness; but the Court confined him upon this rule to the question on the 50*l*. note; as to which, he objected to the plaintiff's recovery, first, that he had no property in the note, and that the defendants, after paying him, might be called on to pay Garbut; and, secondly, that the note was lost by the plaintiff's wrongful act, and a violation of trust injurious to the defendants. It would be doubly hard if the plaintiff should be permitted, after depriving the defendants of the sum to which they would have been entitled for the carriage of the parcel, to charge them with a loss which probably would never have occurred had the parcel been placed at once, as Garbut desired, in the care of the defendants. Besides, the plaintiff never disclosed to the defendants that he had property of such value in his bag, as he ought to have done. *Batson v. Donovan*, 4 B. & A. 21.

Wilde. A bailee who receives property on a contract beneficial to himself, cannot impeach the property of the bailor; he is in the like case with a tenant, who, after consenting to take from a landlord, is estopped to dispute the landlord's title. The plaintiff had at all events a special property in the note, in respect of which he was entitled to recover; as the borrower of a horse would be entitled to recover in trover against any who should take the horse from him. It is doubtful *whether Garbut could recover against the defendants, as [*747] there was no contract between him and them; the plaintiff is responsible to Garbut, and ought, therefore, to have a remedy over against the defendants. If entitled to recover at all, he is entitled to recover the whole value proved to have been in the bag.

TINDAL, C. J. I am of opinion this rule ought to be discharged. The jury were at liberty to inquire what amount of damage the plaintiff had sustained; and in order to recover, the plaintiff must show that he had an absolute or a special property in the parcel lost. That he was not the owner

is admitted; and the question is, whether at the time of the loss he had it on any bailment. The evidence is, that the parcel was delivered to him, not, for the purpose of carrying it to London himself, but, of booking it at the defendants' office in Stockton. In violation of that trust, the plaintiff thought proper not to deliver the parcel to the defendants, but to deposit it in his own bag; thereby depriving Garbut of any remedy he might have had against the defendants in case the parcel had been lost by them, and becoming himself a wrongdoer towards the defendants, by depriving them of the sum they would otherwise have earned for the carriage of the parcel. Does the loss of this parcel, then, give the plaintiff any ground to say he has sustained damage at the hands of the defendants? I think it does not; and therefore this rule must be discharged. The other, which was only granted conditionally in case this should be made absolute, falls also to the ground.

PARK, J. The jury, in limiting their verdict to 15*l.*, proceeded on the principle which has been stated by my Lord Chief Justice, and in which I entirely *748] agree. I anxiously wish to guard against any notion, that a *bailee is permitted to enter into questions of title with his bailor. But the plaintiff had only a very limited trust in respect of the parcel in question; and if he had discharged his duty, should have booked it at the defendants' office. In breach of that duty, perhaps from intended kindness, he puts it in his own bag, and injures the defendants by depriving them of the carriage to which they would have been entitled if he had pursued the instructions of his principal. I am of opinion, therefore, that this rule should be discharged.

GASELEE, J. I am satisfied with the verdict as it stands.

BOSANQUET, J. I agree that it is not competent to a carrier to dispute the title of a party who delivers goods to him. But here the plaintiff conducted himself amiss towards the defendants; the loss was occasioned by his own misfeasance, and he cannot be said to have sustained damage at the hands of the defendants.

Rule discharged.

*749]

*WARD and SOMES *v.* SMITH. *June 25.*

1. Defendant being a competitor with plaintiffs for a contract with the navy board for African timber, the plaintiffs obtained the contract; the defendant then agreed to supply the plaintiffs with a portion of the timber, and made no objection to taking their bills in payment; this agreement, however, having been rescinded on a disagreement as to the terms, the defendant wrote to a merchant at Sierra Leone, who was to supply the timber in question, and of whom the defendant was a creditor and the sole correspondent in London, a letter, reflecting deeply on plaintiffs' mercantile character, and putting the merchant on his guard against them for which, as a libel, the plaintiffs brought an action. The jury having found for the defendant, the Court granted a new trial.
2. The transmission of the letter by defendant to his correspondent held a sufficient publication by defendant.

LIBEL.

A mercantile firm, of which the defendant was a member, had, in conjunction with two other firms, offered to supply the navy board by contract with 36,000 loads of African timber at 9*l.* 10*s.* a load.

The plaintiffs offered to supply it at 9*l.* 9*s.*, and obtained the contract; but being new in the trade, agreed that the contract should be equally divided between themselves on the one part, and the defendant and his friends on the other, upon condition of the defendant and his friends supplying the plaintiffs with half the timber, to be delivered at Sierra Leone at 2*l.* 17*s.* 6*d.* a load, subject to the dock-yard receipt and measurement, and according to the terms of the contract.

The defendant and his friends, however, having ascertained that under the plaintiffs' contract some alteration would probably be made in the usual mode of measurement, which would render the contract less beneficial to the contractors, rescinded their agreement with the plaintiffs.

Had that agreement been acted on, the defendant and his friends would have supplied the timber through the firm of Weston and Clouston, at Sierra Leone, of which firm the defendant was the sole correspondent *and consignee in London, and a creditor to a considerable amount. [*750]

When the plaintiffs' agent applied to the defendant, in the first instance, for a supply of timber, the defendant made no objection to entering into an engagement with the plaintiffs; said he had authority from Clouston to treat with them; and upon being told the payment should be by approved bills, or the plaintiffs' own bills, said, "I dare say they are good enough."

The agreement, however, having been rescinded for the reasons before stated, the defendant addressed and transmitted to Messrs. Weston and Clouston, at Sierra Leone, the following letter:—

"London, 17th September, 1828.

"Dear Sirs,—The annexed is a copy of our last, since when we have yours of the 21st of June, covering bill of lading for 272 logs of timber per Deveron, with bill on Mr. Laing 526*l.*; he has accepted it for 350*l.*, two thirds the amount of the timber; and the remainder is to be paid in cash on the delivery of the cargo as per contract, of which, we believe, you were furnished with a copy. The navy board have come to the determination, which they state to be unalterable, that the timber shall be measured strictly in conformity to the drawings and models referred to in the contract, and thereby making it, as we have before explained to you, perfectly square timber. We of course have nothing to do with it on those terms. The contractors, however, are determined to go on, and for that purpose have appointed Mr. Barber their agent, to purchase the timber necessary to fulfil it, authorizing him, we presume, by powers of attorney or otherwise, to draw bills on them for the cargoes as they are shipped. We confess ourselves at a loss what advice to give you under these circumstances. For the contractors are notorious for everything but *fair dealing, and a strict adherence to their engagements; and should any dispute or difficulty [*751] arise between them and the board, as to the description and measurement of the timber, they would with little ceremony turn round and set Mr. Barber and his bills at defiance: however, the better plan probably will be to act with Mr. Macauley and Mr. McCormick, and on no account to make an engagement to extend beyond the present season. Let the timber be described in the same way as the contracts we have heretofore made for you, and subject to the customs' measure, obtaining Mr. Barber's approbation as to quality and dimensions, although that would, we suspect, have little weight with them. Two pound seventeen shillings and sixpence or three pounds per load should, we think, be the price for timber of twenty-three feet and upwards, and fourteen inches square. Probably the most favourable time to negotiate the sale would be when he is surrounded by ships. To keep our market supplied we shall send out the Woodbridge (520 tons), to leave this in November, for a cargo of timber twenty feet length and upwards; you will therefore prepare for her. The contract up to this moment has not had the slightest effect on the price. We, however, suspect that things cannot remain long in their present state. We remain, Gentlemen, your most obedient,

FORSTER and SMITH."

Upon this the plaintiffs commenced the present action, to recover damages for the libel contained in the letter.

At the trial before Tindal, C. J., London sittings after Hilary term, it was contended, that the letter in question was a privileged and confidential communication, and that, at all events, the mere transmission of the letter by the defendant to his correspondents did not *amount to a publication by the defendant: that the publication was by Clouston, who had betrayed the confidence reposed in him. The Chief Justice was of opinion, that there had been a sufficient publication by the defendant, and left it to the jury to decide whether the letter had been written fairly and honestly for the purposes of mercantile communication, or with a malicious intention to injure the plaintiffs. [*752]

The jury found a verdict for the defendant; whereupon

Wilde, Serjt., obtained a rule *nisi* for a new trial, on the ground that, after the defendant had himself agreed to deal with the plaintiffs and even to take their bills, it was impossible to suppose the letter could have been written for honest purposes.

Taddy, Serjt., showed cause. The letter itself contains passages which justify the supposition that it was written in the necessary confidence of mercantile communication; and if there be evidence on both sides, the Court will not disturb a verdict, particularly where it is in favour of a defendant. It would be destructive of mercantile confidence and communication, if a merchant be called on to assign all the reasons which have induced him to express a given opinion on the characters of persons with whom he or his correspondents may be concerned. The defendant, as a creditor of Weston and Clouston, and for their protection, was directly interested in the communication he made. But in *M'Dougall v. Claridge*, 1 Campb. 267, where the defendant addressed some bankers, and charged the plaintiff with improper conduct in the management of their concerns, Lord Ellenborough said, "If a communication of this sort, which *753] was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted." And in *Dunman v. Bigg*, 1 Campb. 268, "Even if the representations which he made were intemperate and unfounded, still, if he really believed them at the time to be true, he cannot be said to have acted maliciously." Whatever the defendant here may have thought of the plaintiffs at a former period, there is no evidence whatever to show that he believed the representations made in his letter to be at that time unfounded; and the letter being on the face of it confidential and privileged, it was for the plaintiffs to show clearly that the communication was only a cover for falsehood.

The Court, however, thought that, under all the circumstances, the case ought to be submitted to another jury, upon payment of costs, and therefore made the rule Absolute.

SHILLITO v. THEED. June 23.

THE plaintiff having been nonsuited in consequence of the accidental absence of a witness whom he had *subpoenaed*, the Court set aside the nonsuit, and granted a new trial, on payment of costs; although *Wilde*, Serjt., objected, that, the nonsuit not having been occasioned by any misconduct on the part of the defendant, he was entitled to retain his judgment.

*754] *Sir EDWARD STRACY, Baronet, and Another, v. The Governor and Company of the Bank of ENGLAND.

Certain stock of the plaintiffs was transferred under a forged power of attorney: the Bank of England offered to replace the stock if the plaintiffs would first prove the amount under a commission of bankruptcy, issued against a firm in which the forger of the power had been a partner: after this offer, the plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy: Held, that they could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy.

THE declaration stated, that, whereas before and at the time of committing the grievance thereinafter mentioned, the said Sir Edward Stracy and Josias Henry Stracy, as survivors of one Hardinge Stracy, deceased, were lawfully possessed of a certain large sum, to wit, the sum of 605*l.* 11*s.* 2*d.*, interest or share in the joint stock of the annuity created by an act of parliament of the

fourth year of the reign of his late Majesty King George III., intituled, "An Act for charging on the sinking fund certain annuities granted by an act passed in the first year of the reign of his said late Majesty, and for carrying the duties therein mentioned to the said fund, and also for consolidating such of the said annuities as are granted for a certain term of years, irredeemable, with other annuities granted by an act passed in the second year of his said Majesty's reign," and also by several subsequent acts of his said late Majesty's reign for raising further sums, and for consolidating the same with the said annuities, transferable at the Bank of England; which said stock, before the time of the committing of the grievance thereafter mentioned, was standing in the public books of the said Governor and Company in the names of the said Sir Edward (therein described as Edward Stracy of Parliament Street, Esq.), the said Josias Henry, and the said Hardinge Stracy, now deceased, and was in the *care of the said Governor and Company for the purpose, amongst other things, [755 of making and entering in the said books such transfer of the said stock as the said Sir Edward and Josias Henry, as such survivors as aforesaid, should authorize and require; by means whereof the said Governor and Company became liable, and it became and was their duty to make and enter, and suffer and permit to be made and entered, in the books of the said Governor and Company a transfer or transfers of the said stock, or any part thereof, whenever the said Sir Edward and Josias Henry, as such survivors as aforesaid, should authorize and require them so to do: and that, also, at the time of the committing the grievance thereafter mentioned, the said stock remained in the care of the said Governor and Company, and no transfer of the said stock, or any part thereof, had then been made in the books of the said Governor and Company by the authority or at the request of the said Sir Edward and Josias Henry, and the said Hardinge Stracy, deceased, or any or either of them: and that, also, afterwards, and before the committing of the grievance thereafter mentioned, and whilst the said Sir Edward and Josias Henry, as such survivors as aforesaid, were so possessed of and entitled to the said stock, to wit, on the 20th day of May, 1829, at London, the said Sir Edward and Josias Henry contracted and agreed with a certain person, to wit, one Ealard Alder, for the sale and transfer to him of a certain part of the said stock so in the care of the said Governor and Company, to wit, for the sale of 302*l.* 15*s.* 7*d.*, part of the said stock, and the said E. Alder then and there agreed to purchase of the said Sir Edward and Josias Henry the said part of the said stock for the sum of 588*5*l.** 6*s.* 4*d.*, to be paid to the said Sir Edward and Josias Henry at the time of the transfer of the said part of the said stock being made and entered in the *books of the said Governor and Company: and that the said Sir Ed- [756 ward and Josias Henry, as such survivors as aforesaid, afterwards, to wit, on, &c., at, &c., authorized and required the said Governor and Company to make and enter the transfer of the said part of the said stock to the said E. Alder in the books of the said Governor and Company, and the said E. Alder was then and there ready and willing to accept and receive the said transfer, and to pay for the said part of the said stock according to the said contract, whereof the said Governor and Company then and there had notice: by means of which said several premises, the said Governor and Company then and there became and were liable, and it then and there became and was the duty of the said Governor and Company to make and enter the transfer of the said part of the said stock to the said E. Alder in their said books: yet the said Governor and Company, well knowing the premises, but not regarding their said duty, but contriving and intending to deceive and defraud the said Sir Edward and Josias Henry in that respect, did not nor would, when they were so authorized and requested as aforesaid, or at any other time, make and enter the said transfer of the said part of the said stock to the said E. Alder in their said books, but then and there wholly refused and still refused so to do: by means and in consequence whereof, the said Sir Edward and Josias Henry had been prevented from transferring to the said E. Alder the said part of the said stock in com-

pletion of their said contract so made with him as aforesaid, and had lost and been deprived of the said sum of 5885*l.* 5*s.* 4*d.*, which the said E. Alder had agreed to pay to the said Sir Edward and Josias Henry at the time of the transfer of the said part of the said stock being made and entered in the said books *757] of the said Governor and Company: and the said Sir Edward *and Josias Henry, in order to complete their said contract with the said E. Alder, had been forced and obliged to purchase and had actually purchased other stock, at a much higher price than the said sum at which they had so sold the said part of their said stock to the said E. Alder, to wit, at the price of 5923*l.* 2*s.* 3*d.*; and the said Sir Edward and Josias Henry had been and were, by means of the premises, put to great expense of their moneys, to wit, to the expense of 100*l.*, and otherwise greatly injured and damnified, to wit, at, &c., to the damage of the said Sir Edward and Josias Henry of 6500*l.*

To this declaration the defendants pleaded, first, not guilty; and, secondly, that the said several supposed causes of action in the said declaration mentioned did not, nor did any supposed cause of action therein mentioned accrue at any time within six years next before the commencement of that suit.

Upon these pleas the plaintiffs joined issue; and, by a special verdict, the jury found

That, on the 25th of October, 1808, there was standing in the books of the Governor and Company of the Bank of England, in the names of Sir Edward Stracy, then Edward Stracy, Esq., and Josias Henry Stracy, jointly with one Hardinge Stracy, now deceased, the sum of 605*l.* 11*s.* 2*d.* interest or share in the joint stock called the Long Annuities, transferable at the said Bank of England, which sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities belonged to Sir E. Stracy and J. H. Stracy, and Hardinge Stracy, now deceased, as trustees under the will of Hardinge Stracy, Esq., the elder, deceased, and had been transferred to them by the executors under that will: that the accounts of the proprietors of the said stock called Long Annuities are kept in certain books of *758] the Governor and *Company of the Bank of England called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers, of the whole amount of the said stock called Long Annuities; in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit on one side of the account, and on the other side of the account they are debited with all sums transferred from their names: and that certain other books are kept by the Governor and Company of the Bank of England, in which are entered transfers of the said stock called Long Annuities from time to time, purporting to be signed by the parties transferring the same, or their attorney lawfully authorized: that, upon production of the transfer books, the clerks of the Governor and Company of the Bank of England, who keep the ledgers, enter the sums transferred, to the credit of the persons to whom the transfers are made, in the ledgers, by adding those sums to their accounts, if they already have any, or by opening new accounts with such persons if they have not already any accounts in such ledgers: that no entries in the ledgers are made without the authority of the entries which are made in the transfer books; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof, and that any person, on whose account any sum or stock appears in such ledger, is permitted at any time, on application at the Bank of England, to transfer the same, or any part thereof, at his discretion:

That the plaintiffs, at the time the said sum of 605*l.* 11*s.* 2*d.* Long Annuities stood in their names in the books of the Governor and Company of the Bank of England, well knew the course of business, and mode of transferring the said stock:

*759] *That the accounts are balanced twice a year, for the purpose of making out dividends, and that the aggregate amount of the balances form the aggregate of the said stock called Long Annuities; and that such aggregate amount is transmitted half yearly to the audit office of the exchequer, for the

purpose of ascertaining the amount which will be wanted for dividends, and that the dividends are calculated on the balance so ascertained: that an account is also once a year transmitted to the audit office of the exchequer, which contains the names of all the proprietors: that the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto:

That the said Josias Henry Stracy received the dividends due in respect of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, in person, from the month of October 1817 to the month of April 1820 inclusive, and paid them from time to time to the house of Marsh & Co., bankers in Berners Street, to the account of Mrs. Stracy, who had a life-interest in the said Long Annuities under the trusts created by the will of the said Hardinge Stracy the elder:

That, on the 23d of June, 1820, the said H. Stracy the younger being then deceased, an entry was made in one of the transfer books of the Governor and Company of the Bank of England, purporting to be a transfer under a power of attorney, purporting to be granted to one Henry Fauntleroy by the said Sir Edward Stracy, then Edward Stracy, Esq., and Josias Henry Stracy, of an interest or share in the said stock called Long Annuities:

That the power of attorney under which the said entry was made was not executed by the said Sir Edward Stracy and Josias Henry Stracy, or either of *them, but that the signatures to the said power of attorney, purporting to be the signatures of the said Sir E. Stracy and J. H. Stracy, were [*760 forged: that the said H. Fauntleroy had not any authority from them or either of them to make any such transfer; and that the said Sir E. Stracy and J. H. Stracy did not, nor did either of them, ever authorize or request the Governor and Company of the Bank of England to make any transfer of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, or any part thereof, until the request and refusal hereinafter mentioned:

That an entry was thereupon made in one of the ledgers of the Governor and Company of the Bank of England, by which the said E. Stracy and J. H. Stracy were debited with the said sum of 605*l.* 11*s.* 2*d.* Long Annuities, and credit was given to Gilbert Burrington for the sum of 605*l.* 11*s.* 2*d.* in the said stock, and from that time the said Sir E. Stracy and J. H. Stracy ceased to have credit for any sum in the said stock called Long Annuities in the said ledgers: that from that time their account with the Governor and Company of the Bank of England was closed in the said ledgers, and that no dividends on the said stock were applied for or received by the said E. Stracy and J. H. Stracy, or either of them, in respect thereof after the month of April, in the year of our Lord 1820: nor has any dividend warrant on that identical sum of stock separate from other stock since been made out or paid:

That since the 23d of June, 1820, very numerous transfers of Long Annuities, of sums both great and small, have been made to and by the said Gilbert Burrington which have been debited and credited to him, and that the said sum of 605*l.* 11*s.* 2*d.* Long Annuities has thereby become blended and mixed with other stocks standing in the said ledgers in the said Gilbert Burrington's name, and has been transferred and *assigned by him, and that it is not possible to distinguish the account to the credit of which the said Long An- [*761 nuities stand which were so carried to the credit of the said Gilbert Burrington, and debited to the within named Sir E. Stracy and J. H. Stracy as aforesaid:

That the said Sir E. Stracy and J. H. Stracy did not consent to and had not any knowledge of the above entry having been made in the month of June 1820, in the transfer book of the Governor and Company of the Bank of England:

That the said J. H. Stracy was a partner in the said banking-house in Berners street, which carried on business under the firm of Marsh and Co., and the business of which house the said H. Fauntleroy chiefly managed:

That Marsh and Co. kept an account with Martin, Stone, and Co. bankers in the city of London, in the usual way of a banker's account, and that a pass-book

went from one house to the other from time to time according to the usual practice between bankers :

That Marsh and Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made, and that in the due course of business the pass-book and the house-book of Marsh and Co. ought to have corresponded :

That the house-book was in constant use in the banking-house of Marsh and Co., and that the pass-book was frequently brought thither from the house of Martin and Co. ; and when it was at the banking-house of Marsh and Co. the said H. Fauntleroy kept the same generally locked up in his own desk :

That the said H. Fauntleroy was permitted by the other partners to conduct the greater part of the business of the said banking-house without their interference : that they were not men of business : that they had no knowledge of book-keeping : that they reposed great confidence in the said H. Fauntleroy, and *762] that the said *H. Fauntleroy made very many false entries and omissions in the house-book, so that the same did not correspond with the pass-book in many instances : that the said H. Fauntleroy paid into the hands of Martin and Co., and drew out of their hands, considerable sums, which appear respectively in the pass-book, but not in the house-book ; and also made very many other false entries in the other books of the firm without the knowledge and in fraud of his partners, to a large amount :

That on the 23d day of June, 1820, the said H. Fauntleroy ordered one Thomas Butterfield Simpson, a stock-broker, to sell out the sum of 605*l.* 11*s.* 2*d.* Long Annuities, described as standing in the books of the Governor and Company of the Bank of England, in the names of E. Stracy, of Parliament street, Esq., and J. H. Stracy, of Berners street, Esq., survivors in a joint account with H. Stracy, late of Lincoln's Inn, deceased ; and that the said T. B. Simpson sold the same to Gilbert Burrington for the sum of 10,786*l.* 10*s.* 1*d.*, which sum he received from the said G. Burrington : that according to the course of business between the said T. B. Simpson and the said Marsh, Stracy, and Co., the said T. B. Simpson allowed the said Marsh, Stracy, and Co. one half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission ; and that the said T. B. Simpson paid the sum of 10,778*l.* 13*s.* 10*d.*, being the amount of the sum so received by him from the said Gilbert Burrington, deducting one half of the usual commission, by a check payable to the said H. Fauntleroy, into the hands of Messrs. Martin and Co. to the account of Marsh and Co. :

That no entry was made at any time of the said sum of 10,778*l.* 13*s.* 10*d.* in the house-book, or any other books of Marsh and Co., but only in the pass-book of that firm with Martin and Co. :

*763] *That on the 16th of September, 1824, in consequence of the discovery of the forgeries of the said H. Fauntleroy, Marsh and Co. became bankrupts :

That from the month of April, 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh and Co. by which Mrs. Stracy's account was credited with the amounts of the dividends on the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities as it had previously been, and as if those dividends had been regularly received from time to time ; that such entries were all made in the handwriting of the said H. Fauntleroy, and that at the date of the said bankruptcy there was a balance of between 600*l.* and 700*l.* in the books of Marsh and Co. in favour of Mrs. Stracy :

That after the bankruptcy the said Sir E. Stracy made application to the Governor and Company of the Bank of England respecting the said sum of 605*l.* 11*s.* 2*d.* interest or share in the said stock called Long Annuities ; and that thereupon the following letter was written by the attorneys of the Governor and Company of the Bank of England to the plaintiffs, and sent to the said Sir E. Stracy :—

purpose of ascertaining the amount which will be wanted for dividends, and that the dividends are calculated on the balance so ascertained: that an account is also once a year transmitted to the audit office of the exchequer, which contains the names of all the proprietors: that the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto:

That the said Josias Henry Stracy received the dividends due in respect of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, in person, from the month of October 1817 to the month of April 1820 inclusive, and paid them from time to time to the house of Marsh & Co., bankers in Berners Street, to the account of Mrs. Stracy, who had a life-interest in the said Long Annuities under the trusts created by the will of the said Hardinge Stracy the elder:

That, on the 23d of June, 1820, the said H. Stracy the younger being then deceased, an entry was made in one of the transfer books of the Governor and Company of the Bank of England, purporting to be a transfer under a power of attorney, purporting to be granted to one Henry Fauntleroy by the said Sir Edward Stracy, then Edward Stracy, Esq., and Josias Henry Stracy, of an interest or share in the said stock called Long Annuities:

That the power of attorney under which the said entry was made was not executed by the said Sir Edward Stracy and Josias Henry Stracy, or either of *them, but that the signatures to the said power of attorney, purporting to be the signatures of the said Sir E. Stracy and J. H. Stracy, were [*760 forged: that the said H. Fauntleroy had not any authority from them or either of them to make any such transfer; and that the said Sir E. Stracy and J. H. Stracy did not, nor did either of them, ever authorize or request the Governor and Company of the Bank of England to make any transfer of the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities, or any part thereof, until the request and refusal hereinafter mentioned:

That an entry was thereupon made in one of the ledgers of the Governor and Company of the Bank of England, by which the said E. Stracy and J. H. Stracy were debited with the said sum of 605*l.* 11*s.* 2*d.* Long Annuities, and credit was given to Gilbert Burrington for the sum of 605*l.* 11*s.* 2*d.* in the said stock, and from that time the said Sir E. Stracy and J. H. Stracy ceased to have credit for any sum in the said stock called Long Annuities in the said ledgers: that from that time their account with the Governor and Company of the Bank of England was closed in the said ledgers, and that no dividends on the said stock were applied for or received by the said E. Stracy and J. H. Stracy, or either of them, in respect thereof after the month of April, in the year of our Lord 1820: nor has any dividend warrant on that identical sum of stock separate from other stock since been made out or paid:

That since the 23d of June, 1820, very numerous transfers of Long Annuities, of sums both great and small, have been made to and by the said Gilbert Burrington which have been debited and credited to him, and that the said sum of 605*l.* 11*s.* 2*d.* Long Annuities has thereby become blended and mixed with other stocks standing in the said ledgers in the said Gilbert Burrington's name, and has been transferred and *assigned by him, and that it is not possible to distinguish the account to the credit of which the said Long An- [*761 nuities stand which were so carried to the credit of the said Gilbert Burrington, and debited to the within named Sir E. Stracy and J. H. Stracy as aforesaid:

That the said Sir E. Stracy and J. H. Stracy did not consent to and had not any knowledge of the above entry having been made in the month of June 1820, in the transfer book of the Governor and Company of the Bank of England:

That the said J. H. Stracy was a partner in the said banking-house in Berners street, which carried on business under the firm of Marsh and Co., and the business of which house the said H. Fauntleroy chiefly managed:

That Marsh and Co. kept an account with Martin, Stone, and Co. bankers in the city of London, in the usual way of a banker's account, and that a pass-book

went from one house to the other from time to time according to the usual practice between bankers :

That Marsh and Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made, and that in the due course of business the pass-book and the house-book of Marsh and Co. ought to have corresponded :

That the house-book was in constant use in the banking-house of Marsh and Co., and that the pass-book was frequently brought thither from the house of Martin and Co. ; and when it was at the banking-house of Marsh and Co. the said H. Fauntleroy kept the same generally locked up in his own desk :

That the said H. Fauntleroy was permitted by the other partners to conduct the greater part of the business of the said banking-house without their interference : that they were not men of business : that they had no knowledge of book-keeping : that they reposed great confidence in the said H. Fauntleroy, and *762] that the said *H. Fauntleroy made very many false entries and omissions in the house-book, so that the same did not correspond with the pass-book in many instances : that the said H. Fauntleroy paid into the hands of Martin and Co., and drew out of their hands, considerable sums, which appear respectively in the pass-book, but not in the house-book ; and also made very many other false entries in the other books of the firm without the knowledge and in fraud of his partners, to a large amount :

That on the 23d day of June, 1820, the said H. Fauntleroy ordered one Thomas Butterfield Simpson, a stock-broker, to sell out the sum of 605*l.* 11*s.* 2*d.* Long Annuities, described as standing in the books of the Governor and Company of the Bank of England, in the names of E. Stracy, of Parliament street, Esq., and J. H. Stracy, of Berners street, Esq., survivors in a joint account with H. Stracy, late of Lincoln's Inn, deceased ; and that the said T. B. Simpson sold the same to Gilbert Burrington for the sum of 10,786*l.* 10*s.* 1*d.*, which sum he received from the said G. Burrington : that according to the course of business between the said T. B. Simpson and the said Marsh, Stracy, and Co., the said T. B. Simpson allowed the said Marsh, Stracy, and Co. one half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission ; and that the said T. B. Simpson paid the sum of 10,778*l.* 13*s.* 10*d.*, being the amount of the sum so received by him from the said Gilbert Burrington, deducting one half of the usual commission, by a check payable to the said H. Fauntleroy, into the hands of Messrs. Martin and Co. to the account of Marsh and Co. :

That no entry was made at any time of the said sum of 10,778*l.* 13*s.* 10*d.* in the house-book, or any other books of Marsh and Co., but only in the pass-book of that firm with Martin and Co. :

*763] *That on the 16th of September, 1824, in consequence of the discovery of the forgeries of the said H. Fauntleroy, Marsh and Co. became bankrupts :

That from the month of April, 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh and Co. by which Mrs. Stracy's account was credited with the amounts of the dividends on the said sum of 605*l.* 11*s.* 2*d.* in the said stock called Long Annuities as it had previously been, and as if those dividends had been regularly received from time to time ; that such entries were all made in the handwriting of the said H. Fauntleroy, and that at the date of the said bankruptcy there was a balance of between 600*l.* and 700*l.* in the books of Marsh and Co. in favour of Mrs. Stracy :

That after the bankruptcy the said Sir E. Stracy made application to the Governor and Company of the Bank of England respecting the said sum of 605*l.* 11*s.* 2*d.* interest or share in the said stock called Long Annuities ; and that thereupon the following letter was written by the attorneys of the Governor and Company of the Bank of England to the plaintiffs, and sent to the said Sir E. Stracy :—

"4th Dec. 1824.

"Gentlemen,—The Governors and Directors of the Bank of England have had under their consideration your claim to have 605*l.* 11*s.* 2*d.* per annum Long Annuities, which formerly stood in your names, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your names by one of the partners in the late firm of Marsh, Stracy, and Co., and that the produce of the stock was paid into the hands of Messrs. Marsh, Stracy, and Co. You have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. Marsh, Stracy, and Co.'s *commission: and we are directed by the Governors and Directors to request, that such proof may be tendered and [*764 enforced by petition, if it should not be admitted by the commissioners; after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. Marsh, Stracy, and Co., will also be paid to you:

"We beg to add, that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

We are, &c."

That on the 31st of May, 1825, the Governor and Company of the Bank of England paid the said Sir E. Stracy the sum of 605*l.* 11*s.* 2*d.* on his signing and entering into the following receipt and agreement:—

"31st May, 1825. Received of the Governor and Company of the Bank of England the sum of 605*l.* 11*s.* 2*d.*, being the amount of payments which would have been made to me for the two half years on the 10th October and 5th April last on 605*l.* 11*s.* 2*d.* Long Annuities, if that stock had not been transferred, as I allege it to have been, without any legal authority from me:

"I say, received the same, without prejudice to my right to prove for the produce of the said stock under Marsh and Co.'s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I hereby engage, if the said debts should be decided by a court of law to be provable, when required by the said Governor and Company, to tender a proof to the commissioner under the bankruptcy of Marsh and Co. in respect of the produce of such stock sold out by them; and in case such proof *shall [*765 be rejected, to enforce the same by petition at the expense of the said Governor and Company.

E. STRACY, and for J. H. STRACY,

SURVIVORS OF HARDINGE STRACY."

That on or about the 16th May, 1829, the said Sir E. Stracy and J. H. Stracy applied to the Governor and Company of the Bank of England to transfer a part of the said sum of 605*l.* 11*s.* 2*d.* Long Annuities; and that thereupon the attorneys for the Governor and Company of the Bank of England wrote and sent to the said Sir E. Stracy and J. H. Stracy a letter, whereof the following is a copy:—

"Gentlemen,—Having been informed by the officers of the bank that an application was made on your behalf to transfer 300*l.* odd, Long Annuities, from the names of Sir E. Stracy and J. H. Stracy, survivors of Hardinge Stracy, we beg to suggest, that before any application is made relative to the stock transferred in the year 1820, under an authority alleged to have been forged, you should tender to the commissioners the proof engaged to be made by you on the estate of Marsh and Co., in respect of the proceeds of that stock. We are satisfied, that it is equally important to all parties in this case to reduce as much as possible the litigation necessary to an adjudication on the conflicting claims. We confidently expect that these must be disposed of before the vacation, if the measures now in progress are allowed to go on; but if proceedings are adopted against the Bank, the delay and expense will be increased in a degree which it is serious to contemplate. We feel that the delay that has taken place must have been most irksome to the parties; and it has been, no doubt, purposely

created by the agents of the assignees with a view to exhaust the patience of the claimants. We should regret that they succeeded in this when the transaction

*766] is so near a close, particularly as no means have been spared by the Bank to render the delay as little inconvenient as possible to the parties.

If proceedings are adopted against the Bank, they will necessarily avail themselves of every defence within their power, though they will reluctantly enter into such a contest.

We have the honour to be, &c."

That on the 20th May, 1829, and after the death of the said Mrs. Stracy, the said Sir E. Stracy and J. H. Stracy sold to one E. Alder the sum of 302*l.* 15*s.* 7*d.* of the said stock called Long Annuities, for the sum of 5885*l.* 5*s.* 4*d.*, which they received from the said E. Alder: that on the same day the said Sir E. Stracy and J. H. Stracy, together with the said E. Alder, went to the Bank of England and required the Governor and Company of the Bank of England to transfer into the name of the said E. Alder the sum of 302*l.* 15*s.* 7*d.* of the said stock called Long Annuities, as and for part of the said sum of 605*l.* 11*s.* 2*d.* Long Annuities; and the said E. Alder at the same time offered to accept the same; but that the Governor and Company of the Bank of England refused to make such transfer, and stated that there was not the sum of 302*l.* 15*s.* 7*d.* Long Annuities in the names of E. Stracy and J. H. Stracy, survivors of Hardinge Stracy:

That the said Sir E. Stracy and J. H. Stracy afterwards bought and caused to be transferred to the said E. Alder, a sum of 302*l.* 15*s.* 7*d.* in the said stock called Long Annuities, in pursuance of the said sale so made to him, for which sum the said Sir E. Stracy and J. H. Stracy paid the sum of 5923*l.* 2*s.* 3*d.*; and that the said Sir E. Stracy and J. H. Stracy thereby sustained a loss of 37*l.* 16*s.* 11*d.*, being the difference between the said sums of 5923*l.* 2*s.* 3*d.* and 5885*l.* 5*s.* 4*d.*, together with the amount of the *commission paid by them to their broker on the said transaction, amounting to 7*l.* 7*s.* :

That there was negligence on the part of the said Josias Henry, arising from want of knowledge of business:

But as to the issue first within joined between the parties, whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the Governor and Company of the Bank of England are guilty of the premises above laid to their charge or not, the jurors aforesaid are wholly ignorant. And thereupon, &c.

This case was argued at great length in Easter term last, by *Spankie*, Serjt., for the plaintiffs, and *Taddy*, Serjt., for the defendants, chiefly on two points: first, whether the Bank is liable to make good to the original holder, stock which has been transferred under a forged power of attorney; and, secondly, whether the plaintiffs' omission to fulfil their engagement to prove their demand under Marsh and Stracy's commission of bankruptcy did not suspend their right to proceed against the Bank. The decision of the Court is confined to the latter question; but it has been thought right to present an outline of the argument on both points.

Argument for the plaintiffs. Government stock is a right to receive an annuity: it is not a chattel interest of which the holder may be dispossessed, but an incorporeal hereditament of which he cannot be disseised: *Wildman v. Wildman*, 9 Ves. 174; *Bracton*, c. 12; *Justin. Inst.* p. 2, tit. 2; *Vinnius in loc.*; 2 Bl. Com. 40; 3 Bl. Com. 179; *Co. Lit.* 144 b; *Lit. s.* 588: and it is only by express provision in all the statutes touching the national debt, *that government stock passes to the personal representative of the owner. The Bank of England may be likened to the lord of a manor, and wrongful seizure by the lord, or admittance of one who has no claim to be admitted, confers no title. *Watk. Copyh.*; *Zouch v. Forse*, 7 East, 186. The acts of parliament which create the stock provide for the mode of transfer, which can only be effected by the party entitled to the stock, or his attorney duly authorized. In *Hildyard v. The South Sea Company and Keate*, 2 P. Wms. 76, the company were ordered to restore to the right owner stock which had been transferred

under a forged power. There was a similar decision in *Harrison v. Price*, Barnardist. 24, and *Ashby v. Blackwell*, 2 Eden, 299. In *Monk v. Graham*, 8 Mod. 9, the action was brought against the purchaser of the stock: but the right of the original owner has never been doubted; and the decision in *Davis v. Bank of England*, 2 Bingh. 392, was reversed on a mere technical point not argued in the Court below: the reasoning of the Chief Justice as to the in expediency of supposing a transfer to have taken place, remains in its full force. The Bank of England is only the agent of the government to pay dividends; the government is the debtor; and the Bank cannot, without authority, release the debtor from the claim of the real creditor.

Then, assuming the plaintiffs' rights to have been unaffected by the transfer under the forged power, the plaintiffs' engagement to tender a proof of their claim under Marsh and Stracy's commission does not bar their action against the Bank. At the utmost it affords no more than a ground of cross action for the Bank. But the plaintiffs' rights remaining always the same, there is no consideration for their engagement with the Bank: it is *nudum pactum*, and the mere conditional offer of *the Bank does not amount to accord and satisfaction. To bar the action, the Bank should show that they have given [*769 the plaintiff an equivalent for what he demands. Accord without satisfaction is not sufficient. Com. Dig. *Accord*. (B); *Reniger v. Fogossa*, Plowd. 1; *Peyto's case*, 9 Rep. 77, 79; *Onellie's case*, Dyer, 356 a; *Allen v. Harris*, 2 Lutw. 1537, 1 Lord Raym. 122; *James v. David*, 5 T. R. 141. And this cannot be said to be a settlement of conflicting rights and doubtful claims, as in *Longridge v. Dorville*, 5 B. & A. 117, for the plaintiffs' claim is exempt from doubt. The money paid into the house of which the plaintiffs were partners was Burring-ton's money, and not the money of the plaintiffs. The plaintiffs, however, were ignorant of the whole transaction. The breach of trust was committed by Fauntleroy alone, and does not implicate the innocent partners in the firm. *Ex parte Apsey*, 3 Br. Ch. C. 265, *Ex parte Hunter*, 1 Atk. 223, *Ex parte Heaton*, Buck. 386, *Emly v. Lye*, 15 East, 7.

Argument for the defendants. The earlier authorities have very little weight in a question touching the nature and incidents of stock,—a species of property altogether of modern origin. Bracton could scarcely have foreseen the creation of a 3 per cent. fund, and even Justinian and Vinnius must have been in the dark on the subject of consols. But according to the principle laid down by Sir William Grant, in *Wildman v. Wildman*, a party can be no more possessed of stock than he can be dispossessed; he has merely a right to receive dividends; so that the argument derived from the doctrine of disseisin goes too far. The passage in Co. Lit. 144 b, does not lay down that an annuity is *necessarily [*770 real property, but merely that the remedy for it is by writ of annuity, which is in form a real action. And as to incorporeal hereditaments, Blackstone expressly says (vol. iii. p. 170), disseisin of them cannot be by dispossession, but by disturbance in the means of coming at or enjoying them. Unless the plaintiffs were possessed of the stock, they cannot sue the defendants for refusing to transfer it. The question, therefore, is, whether they can be predicated to have been possessed of it, as they aver in the declaration. Of what were they possessed? of the 605*l.* 11*s.* 2*d.*, or of the mere right to receive an annuity in respect of an entry in the Bank books?—Of the right merely. Upon the transfer, that sum is placed to the credit of Burrington; it is subsequently divided, subdivided, passes into various hands, and occasions a multitude of transactions which it would be impossible to unravel. The Bank may buy stock of others, and place it to the plaintiffs' account; but they could not do that which the plaintiffs complain they have refused to do, namely, permit a transfer of what has already been transferred. By all the statutes which create stock it is declared to be personal property; but if it were real, against whom should the writ issue?—Not against the bank, for the government is in effect the debtor. The analogy of the lord of the manor, therefore, suggested in *Hildyard v. The South Sea Company*, is altogether inapposite; and in *Ashby v. Blackwell*, Lord

Northington dissented both from the decision and the reasoning of that case. In *Davis v. The Bank of England*, it was said, the Bank could not refuse to pay the subsequent dividends to the transferee under the forged power; if so, how can the former holder be said to remain in possession? and the declaration here proceeds on the assumption that the plaintiffs are in possession; for the Bank is not called on to make compensation for negligence, but to do that *771] which they can only do on the supposition that the stock still belongs to the plaintiffs. So that at all events the count is ill conceived. Thus, when a carrier loses goods, the owner cannot declare in trover on his possession, but must sue in case for negligence. *Ross v. Johnson*, 5 Burr. 2825.

But, secondly, the agreement between the plaintiffs and the Bank amounts to a settlement of matters in dispute between the parties, which imposes on the plaintiffs the necessity of fulfilling the conditions of the agreement before they can revert to their original claim. And the conditions might have been fulfilled, for the debt is provable under the commission. *Stone v. Marsh*, 6 B. & C. 551. It is not a case of accord and satisfaction, where the party accepting the satisfaction loses all cause of action, but an agreement to suspend a disputed cause of action on good consideration; the consideration being, payment, without demur, of a demand at least questionable, upon the claimants performing a condition precedent. *Longridge v. Dorville* is an authority to show that such an agreement may be insisted on, where an action is brought in breach of its conditions; and *Tatlock v. Smith*, 6 Bingh. 339, shows that the present action is at least premature, the conditions of an agreement for the settlement of claims not having been fulfilled. Then, the produce of the stock having been paid into the firm of which the plaintiffs were members, they have incurred no damage.

In reply it was contended, that possession is according to the nature of the property said to be possessed; and here the possession was the possession of the right to receive the debt, or to command its transfer. The word *possessed* *772] was employed in the declaration according to its popular sense; and the plaintiffs had been sufficiently possessed of the right, to call on the defendants to put them in their original situation, or to pay an equivalent in damages. The plaintiffs had nothing to do with unravelling the subsequent accounts: to oppose that difficulty to their claim would be as hard as to call on an owner of lemons to recompose them when in a state of solution among the combined ingredients of a bowl of punch. The owner of the stock, and the purchaser under the forged power, were, it is true, both innocent; but the buyer was the younger brother, the owner the elder; and as between those two, the elder must be preferred. But the case did not differ from that of a private banker, who was bound to make good to his customer all money paid under a forged authority. *Cur. adv. vult.*

TINDAL, C. J. The declaration in this action is framed in accordance with the judgment of this Court, given in the case of *Davis v. The Bank of England*; in which case it was held that the owner of property in the funds still remained the legal holder of the stock, notwithstanding it had been transferred to another name under a forged power of attorney. Accordingly this declaration states, that the stock had been in the names of the plaintiffs in the books of the Governor and Company of the Bank of England, and that no transfer of the stock had been made; and alleges as a breach of the duty on the part of the bank, their refusal to make and enter in their book a transfer of the plaintiffs to a purchaser of part of the stock. One question, and that which has been principally argued at the bar, turns upon the rule of law laid down by this Court in the case above referred to, and involves, in fact, a rehearing of that case. It becomes unnecessary, however, for this Court, upon the present occasion, to give any opinion *773] upon the law so declared by the Court; indeed, as the question is raised upon the record, it is more satisfactory that a decision in which two of my learned Brothers now sitting with me concurred, should be made the subject of review in another Court, where, in case it becomes necessary, that question may be discussed upon a writ of error.

But it has become unnecessary on the present occasion to review that judgment, because (with the exception of my Brother Bosanquet, who was engaged in the cause, and who has taken no part in this discussion), we all think our judgment ought to be given for the defendants, upon another point which has been presented for the consideration of the Court. For it appears to us that the plaintiffs have, before the commencement of this action, entered into an agreement with the defendants upon good consideration; under which agreement their right of action is suspended, until they take the proceeding which they had bound themselves by such agreement to adopt.

It appears upon the special verdict, that, long before the commencement of the action, the plaintiffs had applied to the defendants respecting the stock in question; and that, upon the 4th December, 1824, the solicitor of the Bank wrote a letter to the plaintiffs, stating, in substance, that if they would prove the amount of their demand against the estate of Messrs. Marsh, Stracy, & Co., and make an assignment of their proof, the Bank would replace the amount of the stock so sold. It was at that time a question of great nicety and difficulty, whether the Bank was by law liable to make good this loss: so that the engagement of the bank to replace this stock without any litigation on their part, was of itself a very valuable and important concession; and a sufficient consideration to support a promise by the plaintiffs, that they would *tender, and endeavour to enforce, their proof against the bankrupt's estate. But it [*774 appears further, that both parties proceeded to act upon the faith of this agreement; and that, on the 31st of May following, the Bank paid to the plaintiffs one year's annuity of this stock, viz. 605*l.* 1*l.* 2*d.*, taking a receipt from the plaintiffs; in which receipt the plaintiffs expressly engage, if the debts shall be decided by a court of law to be provable, to tender a proof to the commissioners when required by the Governor and Company of the Bank of England.

The substance of this contract appears to us to be, that the Bank, on the one hand, agreed to replace the stock, and to pay the intermediate dividends; and the plaintiff, on the other hand, agree, in the first instance, and before they claim the stock adversely, to tender a proof of their debts. And this agreement having been acted upon by the plaintiffs, so far as to receive one of the annual payments due upon this stock; and the plaintiffs, although requested thereto, having refused to tender the proof; we think it would be against good faith to allow this action to be maintainable, until the plaintiffs have performed their part of the stipulation.

It is urged by the plaintiffs, that if this is an agreement on their part, it may be the ground of an action by the Bank to recover damages, but that it is no bar to the present action. But the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the plaintiffs have for a good consideration restrained themselves for suing, not perpetually, but only until they have first done a particular act. And it is not immaterial to observe, that the very circumstance of bringing this action, if the plaintiffs succeed in it, will have the effect of making it impracticable for them to keep their *agreement so entered into with the defendants: for the plaintiffs cannot recover [*775 in this action, except by establishing the principle that they are still holders of the stock which has been sold; and if they continue such holders, they cannot make proof of any debt under the commission.

Under these circumstances, we think the defendants, in order to avoid circuity of action, may avail themselves of this agreement as a suspension of the plaintiffs' right to sue in the present action, and that they are not confined to a remedy by a cross action thereon. The case of *Longridge v. Dorville* appears to us strongly in favour of the validity of such an agreement.

As this point appears to us to be in favour of the defendants, it becomes unnecessary to consider the third question raised by the special verdict; and we, therefore, upon the second ground which was urged in argument, give judgment in this case for the defendants.

Judgment for the defendants.

*776] *FOX v. CLIFTON, WICKEY, LEVI, GREEN, HARTLEY,
PLUMMER, and FENNELL. June 30.

A prospectus was issued for a distillery company with a capital of 600,000*l.* and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up. All persons who did not execute the deed within 30 days after it was ready, were to forfeit all interest in the concern. No more than 7500 shares were ever allotted: only 2300 persons paid the first deposit; only 1106, the second, and only 65 signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern. Held, that an application for shares, and payment of the first deposit, did not constitute a partner, one, who had not otherwise interfered in the concern, and that the insertion of his name by the secretary of the company in a book containing a list of subscribers was not a holding out as partner.

ASSUMPSIT for work and labour, and materials found.

The cause was tried before Tindal, C. J., London sittings after last Trinity term, when the facts appeared to be as follows:—

Early in March 1825, certain persons met together, and resolved that a company should be immediately formed, to be called "The Imperial Distillery Company." After a preliminary announcement of their intention by advertisement, on the 19th March a meeting was held at the London Tavern, at which directors, a clerk, and engineer were appointed; and on the 23d of March a further advertisement appeared in the newspapers as follows:—

"Imperial Distillery Company, capital 600,000*l.*, 12,000 shares, at 50*l.* each:—" (after a list of names of trustees, directors, auditors, bankers, counsel, solicitors, engineers, and secretary; and an explanation of the merits of the scheme; the advertisement proceeded as follows:—) "The affairs of the company are under the management of a board of directors; the capital is 600,000*l.*, in 12,000 shares of 50*l.* each. A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose; and every person who shall *neglect to execute the same within
*777] that time will forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary for carrying on the business of the company, and for enforcing the observance and performance of the several rules and regulations to be contained therein, or in any by-law that shall be from time to time made by the directors. Application is intended to be made to parliament for an act to enable the company to sue and be sued in the name of one of its officers: and the said deed of settlement, when settled and approved by the standing counsel and solicitors, and the act of parliament, when passed, shall be the deed of settlement and act of parliament for managing the affairs of this company.

"The shares will be forthwith allotted; and until offices are taken, all communications are requested to be made to the directors, at the City of London Tavern. (Signed) W. LANE, Sec."

A meeting was held on the 23d of March, at which 7000 shares were appropriated, and letters printed in blank were distributed by the secretary among the intended shareholders, to be addressed by them to Messrs. Fisher and Norcutt, solicitors for the concern, as an application for shares, to the following effect:—

"Sir,—I request you will insert my name for _____ shares of the Imperial Distillery Company, and I hereby engage to make the payment thereon when requested."

To which letters, the secretary replied in the following form:—

"Sir,—I am instructed by the directors of this company to inform you, that they have apportioned to you _____ shares of 50*l.* each in the same, and I
*778] *request you will pay the deposit of 5*l.* per share into the hands of Messrs. Bosanquet, Pitt, and Co., Lombard Street, on or before the 28th inst. W. LANE, Sec."

A list of the persons whom the secretary had so addressed was sent to the bankers, Bosanquet and Co.

On the 28th of March, the defendants, or some person on their behalf, appeared at the bankers' with letters as above, paid the sums required, and took a scrip receipt in the following form :—

London, 28th March, 1825.

"No. 6726 to 6735.

"Received of the directors of the Imperial Distillery Company the sum of fifty pounds.

"For Messrs. Bosanquet, Pitt, Anderson, and Co. "£50.

P. STAINSBY."

The directors then took a counting-house in Mark Lane, and by the end of May took and fitted up a distillery in Buckinghamshire. This was announced to the subscribers by a letter of the 4th of July, which, after stating the purchase and its objects, proceeded,—

"For the purpose of enabling the directors to carry these very desirable objects into effect, they are under the necessity of making a call of 5*l.* upon each share. You will, therefore, have the goodness to pay the sum of 50*l.* (being 5*l.* each on the shares allotted you) any day before the 19th inst., at the office of the company, No. 9, Mark Lane, when the scrip can be exchanged for shares.

"It is particularly requested that you will not delay the payment beyond the day above named; the directors being under engagements essential to the interest of this company, which preclude the possibility of further time being allowed.

W. LANE, Sec."

*It did not appear whether the defendant Clifton had ever received this letter. [*779]

A book was made up by the secretary, of the names of all who had made payments upon their shares, including the defendants, and kept in the counting-house in Mark Lane.

A book was also made up, and kept at the same place, of the names of all who had applied for shares, without regard to the fact of their having paid deposits, or otherwise.

The names were arranged alphabetically, one leaf being assigned to each letter of the alphabet. The names were upwards of 200.

The directors then advertised for tenders in the business undertaken, and the plaintiff applied to the secretary at the counting-house to know of what persons the company consisted. The secretary assured him they were respectable; and, upon the plaintiff's begging he would be explicit, adding, that he should be ruined if misled, the secretary opened the book containing the names of the subscribers, and the plaintiff looked over some of them, but whether he saw the names of the defendants or not did not appear.

On the 18th of July, however, he entered into the contract which was the subject of the present action, and the work was done between the 2d of August, 1825, and the 15th of July, 1826.

The contract was a tender sent by the plaintiff, addressed to the chairman and directors of the Company, in answer to their advertisement.

The partnership deed mentioned in the advertisement bore date the 30th of June, and from that time lay open on the table of the office. It was executed by about sixty-five persons, in the early part of July; but by none of the defendants except Plummer.

*Only 7490 shares were ever allotted: only 2293 persons paid the first deposit; 1106 the second; and no more than fifty or sixty the third. [*780] The defendants, Clifton, Wickey, Levi, and Fennell, did not pay the second or third; and as early as the middle of May, Wickey and Levi had sold their scrip.

Whoever brought the scrip receipt, and proposed to pay the second call and to sign the deed, was permitted to do so, whether the shares had been originally allotted to him, or whether he had purchased them in the market.

On the 16th of July the following notice was published in the London Gazette, of the deed of settlement being ready for execution :—

"Imperial Distillery Company,
No. 9 Mark Lane.

"Notice is hereby given, that the directors having resolved on making a call of 5*l*. a share, to be paid on or before the 18th instant, and also on issuing shares in lieu of scrip receipts, the scrip-holders are therefore requested, either by themselves or their authorized agents, to attend at the office of the company, No. 9 Mark Lane, for the purpose of paying to a committee of directors the amount of the shares held : also for the purpose of exchanging scrip for the shares, and of signing the deed of settlement, which has been approved of by the standing counsel and the directors. Should it be inconvenient for any scrip-holder to attend for the purpose of signing the deed, printed forms of powers of attorney may be procured at the office, empowering persons to execute the deed for them ; it being determined by the directors that no scrip-holder can receive shares for scrip until he has first signed the deed of settlement ; and no scrip can be exchanged for shares after Monday the 18th instant.

W. LANE, Sec."

*781] *On the 25th of July the following letter was addressed by the secretary to the subscribers :—

"Imperial Distillery Company, 9 Mark Lane,
July 25, 1825.

"Sir,—I am directed to remind you that the deed of settlement of this company, which has been approved by the standing counsel, and signed by the directors and many of the subscribers, now awaits your signature ; and that unless the same be signed and the second instalment of 5*l*. per share paid immediately, the shares unpaid for will be forfeited ; the directors having made engagements highly advantageous to the company, which will preclude further time being allowed.

W. LANE, Sec."

On the 12th of August the directors advertised that the deposits would become forfeited on all scrip for which the deed of settlement was not signed, and the first call paid on or before the 23d. And on the 27th of August another advertisement appeared, declaring that such deposits on the now outstanding scrip were forfeited for the use and benefit of the proprietors, and authorizing applications to be made for the shares so forfeited.

On the second call being paid, the scrip receipt was given up and a fresh paper issued, denominated a share. That share-paper was in the following form :—

"Imperial Distillery Company. Capital, 600,000*l*. Shares, 12,000 ; 50*l*. each. No. 685. This is to certify, that John Smith, of London, hath paid the sum of 5*l*. upon the above-mentioned share in this company, and that he is entitled to the same share, subject to the future instalments to be made thereon, and to the laws and regulations of the company as contained in the deed of settlement establishing the same ; and also *subject to such by-laws and

*782] regulations as may be made by the directors of the company.

JOHN DUNSTON,
ROB. HONE,
W. ASTON, } Directors."

(Endorsed)

"Second instalment.

"Received the 18th of July, 1825, the sum of 5*l*., the amount of the second call on the annexed shares.

W. LANE, Sec."

A third call was made by the directors in the latter end of the year 1825.

On the 6th of December, 1825, the defendants Green and Hartley, who had paid the second call, received the following letter :—

"Imperial Distillery Company.

"Sir,—I am instructed by the directors of this company to remind you that you have not paid the third instalment on the shares held by you herein, and to request that you will forthwith pay the same, as no extension of time can be

allowed, an early payment being necessary to carry into effect the objects and operations of the company.

W. LANE, Sec."

On the 23d of December the following letter was also received by the defendant Green from the secretary:—

"Imperial Distillery Company, 9 Mark Lane.

"Sir,—The directors, on inspecting the list of subscribers to this company, have found with much surprise your name amongst those who have omitted to pay the third instalment. I request, therefore, you will immediately pay the same, in order that the necessary arrangements may be completed, and that I may report thereon at the next meeting.

W. LANE, Sec."

*These letters having passed unheeded, the secretary wrote a third letter on the 14th January, 1826, to the defendants Green and Hartley. [*783

"Imperial Distillery Company, 9 Mark Lane.

"Sir,—I am now for the last time instructed by the directors to inform you, that unless the third call of 5*l.* per share on the shares held by you be paid on or before the 21st instant, at the office of the company, you will be considered no longer a shareholder under the deed of settlement, but as having abandoned all interest in the concern; and the shareholders who may have paid will then be deemed the only parties interested in the funds and concerns of the company, and they will forthwith adopt such measures as they think fit, and will no longer hold you answerable for any further instalment, or entitled to receive back any sums whatsoever.

"I repeat that this is the last notice which will be sent, and that the line of conduct in case of your non-payment will be rigidly adhered to.

W. LANE, Sec."

Upon these facts, Tindal, C. J., left it to the jury to say, 1st, Whether, when the contract was entered into with the plaintiff, all the defendants were, as partners, entitled to a share of the profits of the concern.

2dly, Whether, if this were an inchoate partnership, the defendants had legally withdrawn themselves from the concern before the partnership was complete.

3dly, Whether, in such case, they had held themselves out as partners.

A verdict having been found for the plaintiff,

Taddy, Serjt., in Michaelmas term, on behalf of the defendants Clifton and Wickey, obtained a rule nisi to set it aside, on the ground that the first point had been left too widely to the jury, being rather a question of *law than of fact; and that, on the second and third, the verdict was against the [*784 evidence.

Wilde and *Bompas*, Serjts., showed cause against the rule, and *Taddy*, Serjt. supported it; but similar rules having been obtained and supported on behalf of the other defendants by *Adams* and *Jones*, Serjts., and *Bosanquet*, J., having subsequently joined the bench, the Court desired that the cause might be argued again on the single question of partnership. Accordingly,

In Easter term, that point was again argued by *Bompas* for the plaintiff, and *Taddy* for all the defendants.

Argument for the plaintiff.

The question in cases like the present has often been unnecessarily embarrassed by the uncertain meaning attached to the word *partner* or *shareholder*: but whatever designation it may be proper to apply to the defendants, as connected with the Imperial Distillery Company, at all events they were *jointly interested* in it; and if jointly interested, they are jointly liable to the plaintiff. As early as March the company was advertised as an existing company, with directors appointed and announced. Before the plaintiff was employed, the defendants had applied for shares, had contributed to the funds of the concern, and those contributions had been employed collectively with others in the purchase of premises for carrying on the business. If at this period, before anything further had been done, it had been resolved to abandon the concern, and the premises had been resold at a profit, the defendants would have been jointly interested in

and entitled to a share of those profits, whether a partnership had been formally constituted by deed or not. It follows, therefore, that they are jointly liable to the demands on the *concern. This company was not protected by *785] charter or act of parliament, and, therefore, though it consist of never so great a number of members, it is subject to the same law as a partnership of two or three. In *Natush v. Irving, Gow on Partnersh.* 404, Lord Eldon says, "It is not, I apprehend, competent to any number of persons, in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation, by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and in effect, merely by compelling them to retire upon such terms, so to form a *new company*. This would as to partnerships, be a most dangerous doctrine." In *Rex v. Dodd*, 9 East, 527, Lord Ellenborough says, "Independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is, besides, in this prospectus, a prominent feature of mischief; for it therein appears to be held out that no person is to be accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be enrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted by the partnership." And this principle is recognised in *Carlen v. Drury*, 1 Ves. & B. 154, *Baldwin v. Lawrence*, 2 Sim. & Stu. 18, and numerous other cases.

Parties have been holden entitled to a share in the profits of a concern, where their connexion with it has been much less obvious and notorious than that of the *786] defendants in the present case: as the executors of a deceased partner; *Brown v. De Tastet*, 1 Jacob, 284; or minors; *Anon*, 2 Ves. sen. 629. So that if one of the defendants had pleaded in abatement the non-joinder of the rest, the plaintiff could not with safety have replied that they were not partners. In *Ex parte Layton*, 6 Ves. 438, it was held, that the the words "*and Co.*" were sufficient to announce a dormant partnership, and to entitle the defendant to plead it in abatement. And very slight acts have been deemed such a holding out to the world as to render a party responsible: as the mere delivery of a bill of parcels; *Young v. Axtell*, cited in *Waugh v. Carver*; 2 H. Bl. 242; the payment of an instalment towards a joint undertaking; *Holmes v. Higgins*, 1 B. & C. 74; the associating together and subscribing sums of money for the purpose of obtaining a bill in parliament to make a railway; *Kearsley v. Codd*, 2 Carr. & P. 408, *Maudslay v. Le Blanc*, 2 Carr. & P. 409; the contributing to the funds of a building society; *Braithwaite v. Skofield*, 9 B. & C. 401; the paying a deposit on shares in a trading company, and afterwards signing the deed of partnership; *Lawler v. Kershaw*, 1 M. & M. 93. *Perring v. Hone*, 4 Bingh. 28, confirmed by *Ellis v. Schmœck*, 5 Bingh. 521, and *Nockells v. Crosby*, 3 B. & C. 814, are decisions in point to establish the liability of parties, who have entered on an undertaking such as the present.

In *Bird v. Aston* (not reported), the payment of a deposit and instalment was held by Lord Tenterden sufficient to constitute a partnership, except as to one who purchased in the character of a broker.

In the present case, the exhibition of the book containing the defendants' names, and their payment of the *787] deposit at the bankers, were acts of holding themselves out as partners, more unequivocal than any of the acts relied on in the cases cited.

If the defendants were once partners, they could not divest themselves of their responsibility except by a regular dissolution of partnership. *Duvergier v. Fellows*, 5 Bingh. 248, *Goode v. Harrison*, 5 B. & A. 147.

Argument for the defendants.

This was an inchoate, not a complete arrangement; the whole was in *fieri*

till the partnership deed was fully signed; and the directors who gave the orders to the plaintiff were responsible to him, not the other defendants, who took no active part in getting up the concern. It is true, there is no difference between a partnership of five and a partnership of 5000. But where the subject-matter of that which is predicated is uncertain; where the members are uncertain; where the fund, and the number of shareholders required by a prospectus, have not been obtained; though there may be an intent to constitute a company when the concern is launched, yet till that intent is carried into effect by the execution of the deed which is to be the bond of union, the subscribers to the undertaking cannot be called partners. These defendants contracted with the directors with reference to a company or undertaking to be established on a certain scale, to which no material approaches were ever made. The first call was paid by no more than 2298 persons instead of 12,000; the second by 1106 only; and the third by no more than fifty or sixty. Without proof, therefore, that the defendants attended and were active in the concern, they are neither jointly interested nor jointly liable. *Brown v. De Tastet*, and the other cases in equity, turn on the *principle, that no one shall use the property of another [*788 without rendering an account; but they determine nothing as to the parties in whom the property of an inchoate concern shall be deemed to be vested, or as to the exterior liabilities of persons who propose to engage in it. So the decision in *Natusch v. Irving* proceeds on the assumption, that the undertaking was fully established, and the parties all known—*constabat de materia constabat de personâ*. But in *Vice v. Lady Anson*, 7 B. & C. 409, although the defendant had received certificates, and had acknowledged herself to be a shareholder, she was holden not responsible as a partner, because she had not been constituted such by any regular instrument. In *Lawler v. Kershaw* all the defendants except Barber, who had signed the deed, were directors, and as such, personally responsible for the orders they had given: and the same remark applies to *Kearsley v. Codd* and *Maudslay v. Le Blanc*. In *Perring v. Hone*, the point now in discussion, namely, whether subscribers are liable in respect of an inchoate undertaking, was never presented to the Court. The concern with which the defendant was alleged to be connected had been long established, and the only question was, whether he had divested himself of his interest by assigning the scrip, and omitting to sign the partnership deed; and the propositions ascribed to the Chief Justice, that “all who subscribed to the partnership fund must be taken to have assented to the deed,—an assent which the plaintiffs countenanced by afterwards attempting to dispose of their interest,”—can scarcely be deemed law. In *Ellis v. Schmoek* the defendants had all attended meetings, and had been active in the concern. In *Braithwaite v. Skofield* they were all parties to the resolution, which was, in substance, the order for the work in respect of which they were sued. In *Bird v. Aston* there was a *deed [*789 executed by all. And in *Dickinson v. Valpy*, 10 B. & C. 140, tried before Burrough, J., at the Bridgewater Summer assizes 1829, Parke, J., said, upon motion for a new trial in the Court of King’s Bench, “In this case it is very difficult to say that there was sufficient evidence to go to the jury that the defendant actually was a partner; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There is a great difference between the two cases. If there is a contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, I have already said that the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners

in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorized them (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having, in substance, given that authority). In those cases in which a plaintiff has not been induced by the defendant's representation *to give credit to him*, but seeks to fix him because he has *really authorized* the contract to be made, the plaintiff must show that authority, and an authority upon condition not performed, is no authority at all."

*790] "In *Harvey v. Kay*, 9 B. & C. 356, a deed had been executed, and the defendants came within its terms; but in *Bourne v. Freeth*, 9 B. & C. 639, the defendant was holden not a partner, because the partnership was contemplated only, not executed. Lord Tenterden said, "The question, whether he did hold himself out to the world as a partner, depends entirely on the effect of the prospectus which he signed. That instrument indicates that a company was about to be formed, not that one was actually formed. It shows only that it was in the contemplation of the parties who had subscribed their names to it, to establish a company on certain conditions."

In the present case everything remained to be accomplished, and it would be impossible to say with whom the defendants were associated; whether with those who had signed the deed, or those who had not signed: or with those who had paid the first instalment, and not the second; or the second, and not the third. The payments made by, and the letters addressed to, the defendants, gave them no actual interest; but merely a possible interest in case the undertaking should be brought to bear. The directors are the persons solely responsible for the expenses of such a concern; *Nockells v. Crosby*; if, indeed, the plaintiff can have any claim at all upon engaging with an association, at that time, illegal. *Josephs v. Pebrer*, 3 B. & C. 639.

In reply it was urged, that a deed was not essential to the establishment of a partnership: that many partnerships are conducted without: that it is immaterial to the public whether the partners observe the terms of their agreement among themselves; and that an individual who gives credit can inquire no farther than for the names announced at the place where the business of the company is conducted. Vice v. Lady Anson was a case touching an interest in a mine, and turned on the point that nothing had been done to give the defendant *791] "an interest in real property. In *Dickinson v. Valpy*, Parke, J., stood alone in the position cited. In *Harvey v. Kay*, Lord Tenterden relied on the defendant's letters as being conclusive against him: and in *Bourne v. Freeth*, the undertaking was never actually commenced, like the present, by the purchase of premises and the employment of tradesmen. *Cur. adv. vult.*

TINDAL, C. J. This action was brought by the plaintiff against the seven defendants, to recover the amount of a demand for goods sold and delivered by the plaintiff to the defendants, and for work and labour done and materials found by the plaintiff for them, and at their request.

It appeared at the trial of this cause at Guildhall, that the contract, upon which the action was founded, was not made personally and individually with the defendants, but with the chairman and directors of a certain joint stock company called the "Imperial Distillery Company;" the contract being a tender sent in by the plaintiff on the 18th of July, 1825, addressed to such chairman and directors, in answer to an advertisement which had been published by the directors on the 24th of June, stating their readiness to receive tenders for the supply and erection of the works in question. But it was contended at the trial, that upon the evidence in this case, the seven defendants must be considered partners in this company, or, if not partners, that, at all events, they had allowed themselves to be so held out to the plaintiff, and were therefore bound by the contract of the directors, and liable to the payment of the plaintiffs' demand.

Three questions were left to the jury at the trial: first, whether, at the time *792] of making this contract, the defendants were partners in this joint concern; in which case the jury were told the verdict must be for the *plaintiff:

secondly, admitting they were not partners in fact, whether they had by their conduct held themselves out to the plaintiff as partners, or allowed themselves to be so represented at the time of making this contract; in which case, also, the jury were directed to find for the plaintiff: and, thirdly, whether, admitting the defendants to have been at one time dormant partners in this concern, any one of them had ceased to be a partner before the contract in question was made; in which case the jury were told they were to find for the defendants.

The jury found a general verdict for the plaintiff for the amount of his demand; and the case comes now before the Court, upon a rule obtained by the defendants to set aside that verdict, and for a new trial; as well upon the ground that the direction on the first point was not a proper direction, as also that the verdict was against the evidence given in the cause.

The main and important question in this case undoubtedly is, whether, under the circumstances proved at the trial, the defendants were actually partners in the Imperial Distillery Company; for, if partners, the general principle which governs all partnerships in trade would apply to the present case—that each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern; and, consequently, that he is liable to the performance of all such contracts, in the same manner as if entered into personally by himself.

But before we give our judgment upon this, the principal question, it may be convenient to clear the case of the second point which has been made, viz. whether the defendants have held themselves out to the world generally, or to the present plaintiff in particular, as partners in the present concern; for, if such should be the result of the evidence, it would render any inquiry into the first question altogether immaterial.

*Now, the evidence upon which the plaintiff contends that the defendants permitted themselves to be represented to the plaintiff as partners [793] in the concern is, that the secretary to the company had prepared a book containing a list of the names of all those persons to whom shares had been allotted in the concern, in which list the names of the seven defendants had been included; that this list had been left with the bankers of the company to enable them to receive the deposits from the contributors, upon which list the payments had been made and receipts given at the banking-house; and that a copy of it was lying upon the table of the counting-house belonging to the company, where it was seen by the plaintiff when he called upon the subject of the contract; and that, on one occasion, when the plaintiff was expressing a doubt about trusting such a numerous company, the secretary opened the book, and the plaintiff looked over some of the names.

The book itself, when referred to, contained lists, on the different pages, of the names of the several persons to whom shares had been allotted, arranged alphabetically, one leaf being assigned to each letter of the alphabet, and the whole number of names consisted of upwards of 200; so that the merely opening the book in the counting-house and seeing some of the names could not, in the ordinary course of things, give any intimation to the plaintiff that the names of the seven defendants were included in the lists. Indeed, it is not argued on the ground that the plaintiff saw the names of the defendants in this list, but that the bare circumstance that their names were included in such list used for the purposes above specified, by their own permission, was a sufficient holding themselves out to the world as partners in the company.

But, in the first place, there was no evidence that the defendants knew of the existence of any copy of the list at the counting-house; still less, any evidence *that such list was made up, or shown to any one, with their permission [794] or knowledge. The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; and is altogether incompatible with the want of

knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner.

That there must have been some list of the subscribers to so numerous a company, the defendants may, indeed, be taken to have known; it would have been impossible to make calls for deposits, to give notices, or to do any of the acts necessary for carrying on the concern, without a written list of the names of subscribers. So far, therefore, the authority of the defendants to the existence of a list may be assumed. But that implies no authority whatever that a copy should be made out to lie in the counting-house, for the purpose of being shown to strangers who might demand to look at it. And still less could the list left with the bankers be considered as making any communication to the world with the assent of the defendants. That list was a matter in strict confidence and privity between the banker who received the money, and the party who called with the letter in his hand and paid the deposit. It held out no information to the public, because not communicated to any third person whatsoever. Even upon the face of the book itself, it conveyed no information of the relation in *795] which the *parties stood to each other; as it contained nothing but a long list of names, without any notice or heading whatever; leaving it altogether uncertain whether the persons named are partners in any concern actually established, or merely subscribers to a projected partnership: and as to the receipt given by the bankers for the deposit, and called the scrip receipt, it could give no information to any one; for it was a receipt given to the directors *eo nomine*, and not to the individual paying the money.

But, without reference to the information which the plaintiff actually received from the book, we think the communication of this book was no act done by the defendants themselves, or by their authority or permission, so as to make them nominal and ostensible partners, in contradistinction to real partners or sharers in the profits of the concern; so that the verdict, if it rested on this part of the evidence, cannot be supported.

The question, therefore, must be considered, whether, upon the facts of this case, the defendants were partners in the Imperial Distillery Company with the directors and other shareholders, at the time this contract was made: for, by the general rule of law relating to partnerships in trade, each would then be liable to the debts of the whole company contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout Europe; and it is founded, partly on the desire to favour commerce, that merchants in partnership may obtain more credit in the world; and, more especially, on the principle that the members of trading partnerships are constituted agents the one for the other, for entering into contracts connected with the business and concerns of the partnership; so that by the contracts of the agent all his principals are bound. (See Pothier, *Traité du Contrat de Société*, ch. 6, s. 1.) The question, therefore, becomes this,—whether, *796] at the time of this *contract made by the directors, the relation between the defendants and them was such, that the directors were constituted the agents of the defendants to bind them by their contracts?

The first act done on the part of the defendants is an application by letter from each of them, except one, requesting the name of the party to be inserted for a certain number of shares in the Imperial Distillery Company, and engaging to make payment thereon. All these letters appear to have been written between the 2d and 21st of March; and so completely was the company unformed at the time, that the letters were addressed to Messrs. Fishers and Norcutt, who acted as solicitors for the persons, whoever they might be (for it does not distinctly appear), who were endeavouring to establish the concern. On the 19th of March a public meeting was held, which was attended by many

persons, whether by the defendants or not, there is no evidence, at which meeting, according to the language of the secretary, "the company was formed."

On the 23d of March an advertisement appears, headed, "Imperial Distillery Company;—capital 600,000*l.*, in 12,000 shares of 50*l.* each;" giving the names of the trustees and other officers, and advertng to other particulars which it will be necessary to refer to afterwards.

It was not until the 24th, the day following the advertisement, that an answer was sent to the different applicants, signed by the secretary, who had been appointed in the mean time, informing them that the directors had appropriated a certain number of shares to each, and requesting them to pay the deposit of five pounds per share before the 28th of March.

Now, the advertisement described the proposed undertaking as "The Imperial Distillery Company." It is said this description assumes that it is a company already formed: but the very circumstance of publishing an advertisement proves that it was only a project *for a company, not a company actually formed; for if the 600,000*l.* had been subscribed, and the 12,000 shares [*797 allotted, why publish an advertisement? It could only be intended for the purpose of inducing others to subscribe. The description employed in the advertisement of the advantages to be gained by the subscribers, proves also the object of the publication; and the conclusion points more directly to the future formation of a company: it states, that "A deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose; and every person who shall neglect to execute the same within that time shall forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary. The shares will be forthwith allotted; and, until offices are taken, all communications are requested to be made to the directors, at the City of London Tavern."

Now, this advertisement is the basis of the contract between the parties; it is upon the footing of this prospectus, that the seven defendants had their shares allotted to them, and paid their deposits: if they are not partners under this agreement, they are not partners under any; for they neither exchanged their scrip-receipts for certificates of shares; nor executed the deed when prepared; nor paid a second call when made; nor appeared at any meeting; nor interfered with any concerns of the company; nor did any act subsequent to the making this contract; nor any act before, other than applying for shares and paying the deposit of 5*l.* per share, when they learnt from the letter of the secretary that a certain number of shares was appropriated to them.

The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the *advertisement; that is, an assent to, become partners in a company raising a capital of 600,000*l.*, consisting of 12,000 shares, [*798 and to be governed by a deed which should contain the clauses and conditions to be agreed on in future: but we think it implies nothing more; and that it cannot be construed as an assent to the terms of a partnership already formed.

When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7500; when, out of that number, no more than 2300 ever paid the first instalment; when not half the latter number paid the second instalment, and only sixty-five subscribers signed the deed; we think the subscribers were at liberty to say, This was not the trading company upon which we paid our deposit; neither the capital, nor the number of shares, bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest "in the concern" upon their refusal to execute the deed; which loss they appear to have submitted to.

There are no facts subsequent to the payment of the deposit which in any manner affect the seven defendants. On the 30th of June, the deed was prepared for signature, and shortly afterwards signed by the directors, and those of

the shareholders who paid the second instalment, not exceeding sixty-five in number: and it is not immaterial to observe, that so little was the partnership considered as fixed before the execution of the deed, that, according to the evidence of the secretary, any person producing a scrip receipt, and paying a second call, whether an original subscriber or not, was permitted to execute the deed. The defendants, however, on this record, with the exception of Plummer, *799] never executed the deed; nor did any more than two of them ever pay the second instalment.

On the 16th of July there was an advertisement in the Gazette, making a second call for 5*l.*, and informing the subscribers "that it had been determined by the directors, that no scrip-holder could receive shares for scrip until he had first signed the deed of settlement, and no scrip could be exchanged for shares after Monday the 18th instant."

The defendants, except as above, neither exchanged their scrip, nor executed the deed. On the 12th of August the directors advertised that the deposits would become forfeited on all scrip for which the deed of settlement was not signed, and the first call paid on or before the 23d. And on the 27th of August a second advertisement appeared, declaring, "that such deposits on the now outstanding scrip were forfeited for the use and benefit of the proprietors; and authorising applications to be made for the shares so forfeited."

At this moment, therefore, the consequence had followed which the original prospectus had declared, viz., "the forfeiture of the deposits, and all interest and share in the concern;" and no subsequent offer by the directors, to allow the subscribers to be restored to their shares upon the execution of the deed, could alter their relation to each other, unless assented to by themselves.

Upon this first question, therefore, whether a partnership was actually formed, we think, if the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as a test of a partnership, these defendants were not entitled at any time to demand a share of profits, if profits had been made; inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no further, than that the defendants had offered to become partners in a projected concern, and that the concern

*800] proved abortive before the period at which the partnership was to commence: and, therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants; for they began to act in the name of the whole, before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors, must rest upon the security of the directors, who made such contract, and of those subscribers, who, by executing the deed, have declared themselves partners, and of any who have by their subsequent conduct recognised and adopted the acts and contracts of the directors; but they have not the security of the present defendants, who are not proved by the evidence to stand in any one of such predicaments.

It is unnecessary to advert to any of the cases which have been referred to, each of which must rest upon its own peculiar circumstances; except that with respect to *Perring v. Hone*, decided in this court, we think it right to observe, that the great point, whether there was a partnership or not, does not appear to have been made the prominent subject of argument, but to have been rather assumed than disputed; for the advertisement or prospectus was not brought to the attention of the Court, nor is there any argument upon the terms of it. It is not incompatible with that determination, that the Court might have held the proof of partnership incomplete, if the same materials had been brought before them which are presented to us.

Upon the view which we have taken of the two first questions in this case, it becomes unnecessary to give any opinion on the third, as to the divesting of the liability of any of the defendants by the sale of their scrip before this contract was entered into.

*On the whole, therefore, we make the rule absolute for setting aside the verdict for the plaintiff, upon the broad ground, that we do not think, [*801 under the circumstances proved, the directors had any authority to bind these defendants by the contract upon which the action is founded. Rule absolute.

WOMERSLEY v. BOUSFIELD. *June 22.*

A prisoner in custody for debts exceeding 300*l.* is liable to be brought up under the compulsory clause of the Lords' Act.

ANDREWS, Serjt., moved that the defendant, who had been in custody in execution for debts not amounting to 300*l.*, might be brought up under the compulsory clause of the Lords' Act, the plaintiff having given him the twenty days' notice of his intention to require a true account of all his real and personal estate, and all encumbrances affecting the same. Since the motion, he had been charged in execution at the suit of another creditor for 500*l.*; upon which

Bompas, Serjt., contended, that he ought not to be subjected to the compulsory power in the act of 33 G. 3, c. 5; inasmuch as the effect would be to take from him all his property, and still leave him at the mercy of the second execution.

There being a suspicion that the detainer was collusive, the Court remanded the prisoner for a week; when, upon his declining to give in a proper schedule, he was remanded for sixty days, subject to the consequences of his contumacy, the Court being of opinion that, notwithstanding the second execution, he was within the operation of the statute.

See *Chappel v. Ashley*, 5 B. & A. 537.

*REGULA GENERALIS.

[*802

IT IS ORDERED, That from henceforth, in all special arguments in this Court, notice, in writing, of the points which are intended to be insisted upon by each of the parties be delivered to the Judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the Judges, or on separate paper: and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET

MEMORANDUM.

His Majesty King George the Fourth died on Saturday, the 26th June, upon which occasion, only one Judge sat in each Court for the purpose of taking bail.

AN

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TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ACCORD AND SATISFACTION.

Certain stock of the plaintiffs was transferred under a forged power of attorney: the Bank of England offered to replace the stock if the plaintiffs would first prove the amount under a commission of bankruptcy, issued against a firm in which the forger of the power had been a partner: after this offer, the plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy:

Held, that they could not sue the Bank in respect of the stock, till they had fulfilled their engagement to tender the proof under the commission of bankruptcy. *Stracy v. The Governor and Company of the Bank of England.* Page 754

ACTION ON THE CASE.

See EVIDENCE, 2. CARRIER, 1.

The plaintiff, who had a right to irrigate his meadow by placing a dam of loose stones across a small stream, and occasionally a board or fender, fastened the board by means of two stakes, which had never been done by his predecessors:

The defendant, who had rights on the same stream, removed the stakes and the board also:

A verdict having been given for the plaintiff in an action for such removal, the Court refused to set it aside; holding, that the defendant had no right to remove the board as well as the stakes, on the ground that the stakes gave the board a character of permanency incompatible with her own rights. *Greenlade v. Halliday.* 379

2 Where a party recommends an agent, by making statements which he knows to be false, he is responsible in damages for the misconduct of the agent, although it be not shown that the recommendation was given

from malice, or with a view to the pecuniary interest of the party recommending. *Foster and Another v. Robert Charles.* 396

3. Plaintiff left in a hackney-coach in London, and lost her reticule, containing a 100*l.* bank post bill, endorsed in blank; she issued hand-bills proclaiming her loss. Defendant, a banker at Brighton, who had never heard of the loss, cashed the bill for a stranger eight days afterwards. The stranger, on being asked his name, said he was on a journey, and wrote on the bill a fictitious address in an illiterate hand. The defendant did not inquire at what inn he was staying: Held, that the defendant was liable for the amount to the plaintiff. *Strange v. Wigney.* 677

ADULTERY.

See DOWER, 1.

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ANNUITY.

Breaches need not be assigned under 8 and 9 W. 3, c. 11, on non-payment of an annuity secured by a warrant to confess judgment on a *mutuus*. *Shaw v. The Marquis of Worcester.* 385

ARBITRATION.

Plaintiff, who had taken a verdict subject to an award under an order of *nisi prius*, after the case had been heard, and just before the

CERTIFICATE.

See *BANKRUPT*, 8.

CLERK OF PEACE.

The appointment to the office of clerk of the peace is in the *custos rotulorum* of each county, and King's county, in Ireland, is not an exception. *Bayley, J., diss. Harding v. Pollock and Another.* 25

COGNOVIT.

In an action on the case, defendant gave a *cognovit* for 200*l.*, with a defeasance conditioned for the performance of various matters by a given time, and performed the matters (in part at least) within two months after the time stipulated. Plaintiff having issued execution on the *cognovit*, the Court referred it to the prothonotary, to see how much, if anything, ought to be paid to the plaintiff. *Charrington v. Laing.* 242

2. One of two who had been partners, having, after the partnership was dissolved, given in an action against the two a *cognovit* for debt and costs as between attorney and client, without the knowledge of his co-defendant, the Court set the judgment aside. *Rathbone v. J. and D. Drakeford.* 375

CONDITION PRECEDENT.

See *ACCORD AND SATISFACTION*.

COSTS.

See *PRACTICE*, 1. *ATTORNEY*, 3.

1. Defendant was arrested for 37*l.*; he tendered 250*l.*, but did not pay it into Court. An arbitrator, to whom the cause was referred, awarded the plaintiff only 250*l.*: Held, not a case to entitle defendant to costs for a malicious and vexatious arrest. *Sherwood v. Tayler.* 280

2. One of several defendants in an action of debt, having pleaded bankruptcy, plaintiff entered a *relle prosequi* as to him: Held, that such defendant was not entitled to his costs under 8 Eliz. c. 2, although before plea the plaintiff was apprised of the bankruptcy. *Booth and Another v. Middlecoat and Others.* 445

3. D. having given a *cognovit* for 357*l.*, mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same.

The mortgagee having levied execution, her right to the goods seized was disputed in an action at the suit of certain persons, who claimed to be assignees of D. under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, D. proving not to be bankrupt:

Held, that the mortgagee could not claim from D. the costs of this action, as costs or charges attending the judgment confessed by D.

2. D. having stated at the execution that certain goods levied were not his property, and the sheriff having, by inquisition, ascertained that they were, the mortgagee was holden entitled to claim of D. the costs of the inquisition, if she had paid them to the sheriff. *Doe d. Holt and Others v. Roe.* 447

4. Defendant having been arrested for 1123*l.*, when the plaintiffs had the means of knowing that only 715*l.* was due, was held entitled to his costs under 43 G. 3, c. 46, although the accounts between plaintiffs and defendant were somewhat complex. *Forster and Another v. Weston.* 527

5. In an action on the case for a malicious prosecution, *per quod* plaintiff was falsely imprisoned, one of several defendants obtaining a verdict, is not entitled to his costs under 8 & 9 W. 3, c. 11, if a verdict pass against the others. *Murray v. Nichols and Others.* 530

6. Where there are several defendants who obtain a verdict generally, the costs of all must be taxed at the same time, although they defend separately. *Smith and Others, Assignees of Cook, v. Campbell and Others.* 637

COVENANT.

1. A covenant with a lessor of premises in a parish, to indemnify the parish against any paupers which the covenantor may cause to be settled in it, is valid. *Walsh, Bart., and Another, Executors of Sir H. Strackey, v. Fussell.* 163

2. A covenant not to sue upon a bond during the life of the obligor, and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor, during his life, interest on the amount recovered: Held, no bar to an action by an assignee of the bond in the name of the obligee. *Morley v. Fear.* 547

3. Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions, upon a waste near the mines, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it: Held, that such a covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

The lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors and waste lands; and also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines, *habendum* the said demised premises, with the appurtenances, for twenty-one years. The lessor afterwards granted his reversion of and in the said demised premises, with the appurtenances, to G. B., who, by will, devised the same to the plaintiffs: Held, that the covenant to build the new smelting mill tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it. *Easterby v. Sampson and Another.* 645

4. Tenant for life, remainder over, by indenture demises to lessee, his executors, &c., for fifteen years, without any express covenant for quiet enjoyment; lessee is evicted by remainder-man after death of tenant for life, and before expiration of the fifteen years: Held, that lessee cannot maintain covenant

against executor of tenant for life. *Adams v. Gibney and Others.* 656

DAMAGES.

See ASSUMPSIT, 1.

DEED.

1. By an agreement between defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on defendants' business, and paid the creditors 10s. in the pound; they then tendered for execution by defendants a conveyance of all their estate containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance: the instrument not having been executed by all the creditors, a meeting at which the defendants were called on to execute was adjourned, that the signature of every creditor might be obtained:

Held, that plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least, till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. *Tatlock and Others v. Smith and Others.* 339

2. Defendant drew bills as surety for the acceptor C. H., and it was provided by a deed, to which plaintiff, the holder of the bills, as well as the defendant, was a party, that he should not sue defendant on the bills till C. H.'s effects should have been sold, and the proceeds applied in discharge of the bills.

C. H.'s effects were seized and sold under a commission of bankruptcy, the trustee to whom they had been conveyed by the deed in question having, with the knowledge and assent of the defendant, omitted to take possession of them in time:

Held, that the plaintiff was not barred from suing the defendant on the bills. *Lancaster and Another v. Harrison.* 726

DEMISE.

See LANDLORD AND TENANT, 2.

DEVISE.

1. Devise of testator's freehold messuages, stock in the funds, money and debts, and all shares or property which he might be possessed of or entitled to, to trustees and their executors, in trust for testator's wife and children, &c.

Codicil devising testator's copyhold to his wife till the expiration of certain leases, and after that to be sold, and the money to be placed in the funds for the benefit of testator's children, as directed in the will:

Held, that the trustees took no interest in the copyhold, and that the wife's interest terminated on the expiration of the leases. *Chapman v. Prickett.* 603

2. Testator, after bequeathing pecuniary legacies to his children, devised to his widow the whole of his remaining property in the Bank

of England or otherwise, and also a freehold house in S., a freehold estate in R., a copyhold estate in B., and a leasehold estate in A., with all right and title to the same: Held, that the widow took a fee in the freehold, and a customary fee in the copyhold. *Sharp v. Sharp.* 630

DISCHARGE.

See INSOLVENT, 2.

DISTRESS.

See LANDLORD AND TENANT, 1, 7.

DOWER.

Adultery is a bar to dower, although committed after the husband and wife have separated by mutual consent. *Hethrington v. Graham.* 135

EJECTMENT.

See PRACTICE, 13, 23.

1. In favour of a defendant in ejectment, who showed no title to the premises sought to be recovered, the Court would not presume a surrender of a mortgage term to the owner of the inheritance, from the circumstance, that, in 1802, the Court of Chancery had decreed a sale of the mortgaged property for the payment of the money borrowed, and that some sales had taken place under the decree: But the defendant had not purchased the land in question under the decree, and there was no evidence of any further proceedings in Chancery. *Doe dem. Hammond and Others v. Cooke and Another.* 174
2. Notice to a weekly tenant to quit at the end of his tenancy next after a week from the date of the notice, sufficient. *Doe d. Campbell v. Scott.* 352

EVIDENCE.

See PLEADING, 7. LIBEL, 2.

1. One who admits he is liable in respect of a claim on which an action is brought, is nevertheless incompetent to be a witness in the action; for though contribution in respect of the claim advanced be ultimately against his interest, he has a stronger immediate interest to defeat the action or lessen the damages. *Hall v. Res.* 181
2. In an action on the case for a malicious prosecution, the plaintiff is to give *prima facie* evidence of want of probable cause, which the defendant may rebut, if he can, by showing the existence of probable cause.

Defendant presented two bills for perjury against the plaintiff, but did not appear himself before the grand jury, and the bills were ignored.

He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till plaintiff taking the record down to trial, and the defendant declining to appear as a witness, although in court, and called on, plaintiff was acquitted:

Held, sufficient *prima facie* evidence of want of probable cause. *Willans v. Taylor.* 183

3. An ancient statement concerning the pay-

ment of the tithes of a parish by a modus, signed by the rector for the time being, is evidence against a succeeding rector, as an admission by his predecessor, although found among the title-deeds of a land-owner in the parish, and not in the bishop's registry. *Aladdison v. Nuttall.* 226

4. 1. In an action by the assignee of an insolvent, it is not necessary to prove his petition to the Insolvent Debtors' Court, as part of the assignee's title.

2. The insolvent is an incompetent witness for the assignee, although he be willing to release the surplus of his effects. *Delafeld, Assignee of David Jones, an Insolvent, v. Freeman.* 294

5. Defendants, A. and B., were sued on a bill of exchange accepted by them while in partnership, B. pleaded bankruptcy and certificate, and the plaintiff entered a *not. pros.* as to him.

Having released his surplus effects, Held, he was a competent witness for A. *Affalo v. Fourdrinier.* 306

6. After the plaintiff has proved, by witnesses, a case of implied or oral contract, he cannot be noutsuited by the defendant's producing an unstamped written instrument, purporting to contain the terms of the contract. *Fielder v. Ray.* 332

7. A remainder-man after a tenant in tail is not a competent witness for the tenant in tail, in ejectment for the entailed property. *Doe d. Lord Teynham v. Tyler.* 390

8. The Court will not take judicial notice of the sheriff's book. *Russell v. Dickson.* 442

9. Plaintiff's witness proved an acknowledgment by the defendant, that he held under T., and stated that he, witness, had drawn an agreement touching the premises between plaintiff and T.:

Held, that plaintiff was bound to produce the writing. *Fenn d. T. Thomas v. Griffith and Another.* 533

10. In a suit touching the validity of a parish rate, the plaintiff is entitled to inspect the parish books without paying any costs. *Newell v. Simpkin and Others.* 565

11. Plaintiff declared on an agreement to employ him at the end of a year.

Defendant pleaded the general issue, and that there was no memorandum in writing of the agreement, as required by the statute of frauds. Plaintiff replied, that there was such a writing:

Held, he was bound to permit an inspection of it by defendant, although it consisted only of a letter from defendant's agent. *Blogg v. Kent.* 614

12. Where a witness remains in court after an order for witnesses on both sides to withdraw, it rests in the discretion of the Judge, whether such witness shall be heard; except in the exchequer, where he is peremptorily excluded. *Parker v. M'William.* 683

EXECUTION.

See LANDLORD AND TENANT, 4.

A sheriff's officer, at the request of U., against whom he had to execute a *fi. fa.*, continued in possession of the effects levied, and carried on the business of a farm for U. during three months; an action was then brought by the sheriff, and judgment obtained against

a purchaser of U.'s crops, &c., upon which a balance remained in favour of U. after defraying the amount to be levied against U., and the attendant expenses. The sheriff having in his return taken credit for the expenses in carrying on the farm, and having afterwards, by letter, admitted the sum recovered from the purchaser of the crops, without repudiating the conduct of the officer: Held, that he, and not his officer, was liable for the balance to U., notwithstanding the officer had managed the farm at U.'s request. *Underhill v. Sir T. Wilson, Bart.* 697

FINE AND RECOVERY.

1. Fine permitted to pass as of a term twenty-two years previous, upon payment of the king's silver, all surviving parties interested consenting, upon its being shown that, unknown to the parties, the clerk instructed to pass it had absconded with money intrusted to him for payment of the king's silver, when that payment alone was wanting to complete the fine. *Ask and Wife and Watts, Consuors; Gye, Cenusee.* 275
2. Scotch fine. *Hack's Fine.* 333

FIXTURES.

See LANDLORD AND TENANT, 3.

FRAUDS, STATUTE OF.

1. The plaintiff, an occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the vicar for tithes: Held, that this was not a promise required by the statute of frauds to be in writing.
2. The vicar having succeeded in the suit, plaintiff's attorney paid the vicar the costs recovered from the plaintiff. The plaintiff gave his attorney a promissory note for the amount, and before the promissory note became due, sued the defendant: Held, to be sufficient proof of an allegation that the plaintiff had paid the vicar's costs. *Adams v. Dansey.* 506

FREIGHT

The plaintiff, by charter-party, agreed with G. to convey corn at 4s. 6d. a quarter. G. made a sub-charter with S., who consigned corn to the defendants under the bills of lading, by which they were to pay 6s. a quarter freight, and gave them notice to retain 1s. 6d. a quarter for him:

The plaintiff having sued for freight at 6s. a quarter: Held, he was entitled to recover only 4s. 6d. *Mitchenson v. Begbie and Others.* 190

GUARANTEE.

In April 1825, defendant guaranteed the payment of money due from his son to the plaintiff upon a sale of timber. The plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till December, 1827, when the son became bankrupt. The plaintiff never disclosed to the defendant the issue of these applications, but in December 1827 sued him on his guarantee: Held, that the defendant was not discharged by the time that had

elapsed, nor by want of notice of the applications made to his son. *Goring v. Edmonds.* 94

2. "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of 50*l.*:" Held, that the consideration for the guarantee sufficiently appeared. *Newbury v. Armstrong.* 201
3. I do hereby agree to guaranty the payment of goods to be delivered in umbrellas and parasols to J. and E. A. S., according to the custom of their trading with you, in the sum of 200*l.* Held, a continuing guarantee. *Hargreave v. Smee.* 244
4. "I hereby agree to be answerable to K. for the amount of five sacks of flour, to be delivered to T., payable in one month. Nov. 18. T. G."

Held to be a guarantee for flour, not exceeding five sacks delivered at one time, and not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks. *Kay v. Groves.* 276

INDEMNITY.

See PRACTICE, 18.

INSOLVENT.

See EVIDENCE, 4. TRESPASS, 1. PRACTICE, 15.

1. A payment by an insolvent to a creditor, within three months before the insolvent's imprisonment, is void under 7 G. 4, c. 57, s. 32, although the word *pay* is not employed in that section. *Herbert, Assignee of Knight, v. Wilcos.* 203
2. An insolvent is not exonerated from damages unascertained at the time of his discharge, although the action in which they are sought to be recovered was commenced, and judgment by default suffered, prior to his first imprisonment. *Wilmer v. White.* 291
3. A warrant of attorney given to a particular creditor by one who at the time intends to take the benefit of the insolvent debtors' act, is a charge on property or a transfer of it by assignment within the thirty-second section of 7 G. 4, c. 57. *Sharpe and Another, Assignees of Harris, an Insolvent, v. Thomas.* 416
4. The sixteenth section of the 7 G. 4, c. 57, which declares that it shall be lawful for the provisional assignee of the insolvent debtors' court to sue in his own name for the effects of insolvents, if the court shall so order, is only affirmative of the provisional assignee's right, and he may sue with or without such order. *Dance, provisional Assignee of Shepherd, an Insolvent, v. Wyatt.* 486
5. A prisoner in custody for debts exceeding 300*l.* is liable to be brought up under the compulsory clause of the Lords' Act. *Womersley v. Bonsfield.* 801

INTEREST.

Defendants bound themselves by deed to pay 1500*l.* to be delivered to R. D. in goods, by three payments of 500*l.* each, at three, five, and seven months: Held, that the instrument did not carry interest. *Foster and Others v. Weston.* 709

JOINT STOCK COMPANY.

A prospectus was issued for a distillery company with a capital of 600,000*l.* and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up. All persons who did not execute the deed within 30 days after it was ready, were to forfeit all interest in the concern. No more than 7500 shares were ever allotted; only 2300 persons paid the first deposit; only 1106, the second, and only 65 signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern.

Held, that an application for shares, and payment of the first deposit, did not constitute a partner one who had not otherwise interfered in the concern, and that the insertion of his name by the secretary of the company in a book containing a list of subscribers was not a holding out as partner. *Fox v. Clifton and Others.* 776

JUDGMENT.

See PRACTICE, 17.

LANDLORD AND TENANT.

1. It was stated in a special verdict, that, by an indenture, A. demised to B. all that wharf next the river Thames described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river Thames opposite to and in front of the wharf, between high and low water mark, as well when covered with water, as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low water mark was not demised:

Held, that the lessor could not distrain, for rent in arrear, barges, the property of B., lying in the space between high and low water mark, and attached to the wharf by ropes. *Capel and Another v. Buzzard and Others, Assignees of Jones and Another, Bankrupts.* 150

2. 1. Agreement for a lease, with stipulation for the lessee to commence with laying out a considerable sum on the premises (the lease to contain certain specified covenants), "and in the mean time, and until such lease shall be executed, to pay rent, and to hold the same premises, subject to the covenants above mentioned:"

Held, to amount to an actual demise.

2. Use and occupation lies for constructive as well as actual occupation. *Pisero, one, &c. v. Judson and Another.* 206

3. A pump erected by a tenant during his term, and slightly affixed to the freehold, is removable as a tenant's fixture. *Grymes v. Boveren.* 437

4. A landlord, who seizes his tenant's goods under an execution, the proceeds of which he is obliged to refund to the assignees of the tenant under 7 G. 4, c. 57, s. 34, cannot retain against the assignees the amount of a year's rent under the 8 Ann. c. 14, s. 1. *Taylor and Another, Assignees, &c. v. Langyon.* 536

5. 1. Where the lessor of the plaintiff, upon affidavit that a tenancy under a written instrument has been duly determined, moves that the defendant may give security for costs, a subsequent retaking, if an answer to the motion, must be alleged with particularity and precision.

2. A notice on the 28th of September, to quit on the ensuing 25th of March, is a sufficient half-year's notice to quit. *Roe d. Durrant v. Doe.* 574

6. A mortgagee is not permitted, under 11 G. 2, c. 19, to come in and defend as landlord in ejectment, unless he be interested in the result of the suit. *Doe d. Pearson v. Roe.* 613

7. Plaintiff being about to take an apartment of defendant's tenant, defendant promised plaintiff never to trouble him or his property so long as he paid the tenant the rent of the apartment.

The plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the defendant, who had received no notice of the tender, distrained plaintiff's goods for rent due from the tenant to defendant:

Held, that his right to distrain was not barred. *Welsh v. Rose.* 638

LIBEL.

1. 1. A statement in a newspaper of the circumstances of a cause tried in a court of justice, given as from the mouth of counsel, instead of being accompanied or corrected by the evidence, is not such a report of the proceedings of a court of justice, as a newspaper is privileged to publish.

2. In mitigation of damages, the defendant was allowed under the general issue to show that he copied this statement from another newspaper, but was not allowed to show that it had appeared concurrently in several other newspapers. *Saunders v. Mills.* 213

2. 1. It is a libel to publish in a newspaper a story of an individual calculated to render him ludicrous, although he may have told the same story of himself.

2. Proof that the defendant accounted for the stamp-duties of the paper in question, is proof of publication. *Cook v. Ward.* 409

3. 1. The declaration alleged, that the plaintiff had been appointed as surveyor of a company or society, called "The New England Company;" and had been employed by them as such; and that defendant libelled him in his employment:

Held, that it was not necessary to allege, with extreme precision, the description of the company, or to prove the plaintiff's appointment, the libel being alleged of the plaintiff in his employment.

2. The libel charged plaintiff with being the most artful scoundrel that ever existed, and with being insolvent; but the writer added, that he had never disclosed the matter, nor ever would, except to the person whom he addressed and his friend. This latter assertion was omitted in the declaration:

Held, that the omission was not material. *Rutherford v. Evans.* 451

4. 1. Defendant being a competitor with plaintiffs for a contract with the navy board for African timber, the plaintiffs obtained the

contract; the defendant then agreed to supply the plaintiffs with a portion of the timber, and made no objection to taking their bills in payment; this agreement, however, having been rescinded on a disagreement as to the terms, the defendant wrote to a merchant at Sierra Leone, who was to supply the timber in question, and of whom the defendant was a creditor and the sole correspondent in London, a letter, reflecting deeply on plaintiffs' mercantile character, and putting the merchant on his guard against them, for which, as a libel, the plaintiffs brought an action. The jury having found for the defendant, the Court granted a new trial.

2. The transmission of the letter by defendant to his correspondent held a sufficient publication by defendant. *Ward and Another v. Smith.* 749

LIMITATION OF ACTION.

By the Brighton improvement act, actions for any injury done by the commissioners under the act, are to be brought within six months after the thing done.

The defendants proceeding under that act to dig a sewer, cracked the walls of the plaintiff's house:

Held, that the plaintiff's right of action was limited to six months after the day on which the crack was occasioned, and did not continue for as long a time as the crack continued. *Lloyd v. Wigney and Others.* 489

LIMITATIONS, STATUTE OF.

1. Plaintiff sued in Hilary term, 1829, on a debt which accrued more than six years before: Held, that the 9 G. 4, c. 14, which came into operation on the 1st of January, 1829, precluded him from recovering on an oral promise to pay the debt, made by defendant in February, 1828. *Towler v. Chatterton.* 258

2. "Plaintiff's claim, with that of others, shall receive that attention that, as an honourable man, I consider them to deserve, and it is my intention to pay them; but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive:"

Held, not an unqualified acknowledgment from which the Court could imply a sufficient promise to pay to take a case out of the statute of limitations. *Fearns v. Lewis.* 349

LIQUIDATED DAMAGES.

See *COGNOVIT*, 1.

Liquidated damages cannot be reserved on an agreement containing various stipulations, of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. *Kemble v. Farren.* 141

MAGISTRATES.

Defendant, as a magistrate, committed to prison as a felon, the plaintiff, against whom a charge had been made of maliciously cutting down a tree on premises in his occupation, the property of A. B.: Held, that defendant was not liable to an action. *Mills v. Collett, Clerk.* 65

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Pages 200, 348, 481, 802.

MODUS.

See EVIDENCE, 3.

MORTGAGE.

See COSTS, 3. LANDLORD AND TENANT, 5.

NEW TRIAL.

The Court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury. *Doc d. Lord Teynham v. Tyler.* 561

2. The plaintiff having been nonsuited in consequence of the accidental absence of a witness whom he had subpoenaed, the Court set aside the nonsuit, and granted a new trial on payment of costs; although it was objected, that, the nonsuit not having been occasioned by any misconduct on the part of the defendant, he was entitled to retain his judgment. *Skilite v. Theed,* 753

NOTICE TO QUIT.

See EJECTMENT, 2.

OUTSTANDING TERM.

See EJECTMENT, 1.

PLEADING.

See ANNUITY, 1. LIBEL, 3. PRACTICE, 20. CARRIER, 1.

1. Where a verdict was taken by consent on two counts, the Court, on the application of the plaintiff, amended the postea, by entering the verdict on one (to which the evidence applied) although the Judge who presided at the trial declined to interfere. *Henley v. the Mayor and Corporation of Lyme Regis.* 100
2. A vovry for rent due from plaintiff, as tenant of premises to avowant, under a demise before then made, at the yearly rent of 170l. :

Held, not supported by a proof of a conveyance to avowant, to which three trustees, the lessors, were parties, but which was executed by only two of them. *Phillpott v. Dobinson.* 104

3. It is a fatal variance to describe a bond, conditioned for payment by A., B., and C., as a bond conditioned for payment by A., B., and D., although the bond be several as well as joint, and the action be brought against A. severally. *Adams and Others v. Bateson.* 110
4. The Court will not allow a party to plead in *assumpsit* matter which may be given in evidence under the general issue, unless the plea be simple, and not likely to perplex the plaintiff. *Hammond v. Teague.* 197
5. An assistant overseer, appointed under the 59 G. 3, c. 12, and having, by virtue of his office, the poor rate in his custody, is liable to a penalty for refusing to produce it to an inhabitant when lawfully demanded, according to the 17 G. 2, c. 3.

2. The declaration alleged that defendant

was assistant overseer; that a rate for the relief of the poor was made and duly allowed: and although defendant, as such assistant overseer, had the rate in his possession, and although plaintiff, at a reasonable time, demanded an inspection of it, and tendered 1s., yet defendant refused to produce it, whereby he forfeited 20l. :

Held, on motion in arrest of judgment, that the count was sufficient; for if the defendant had the rate in his custody as assistant overseer, it might be presumed that it was his duty to produce it when lawfully demanded. *Edwards v. Bennett.* 230

6. Libel. Defendant published that plaintiff, a proctor, had been suspended three times, *per quod* his neighbours were led to think he had been guilty of extortion. Plea, that he had been suspended once for extortion: Held ill. *Clarkson v. Lawson.* 266
7. Declaration, that plaintiff, at the request of defendant, and upon defendant's undertaking to indemnify, defended an action for the recovery of money in which defendant claimed an interest; that judgment was given against plaintiff for 42l. ; and that he was imprisoned, and paid the money under a *ca. sa.* :

Held, that he might recover against defendant this sum under this count upon proof of the judgment, without proof of the *capias* ; or even on a count for money paid to defendant's use; the defendant having taken out a summons to be permitted to pay such sum in discharge of plaintiff's demand. Held, also, that the above special count did not disclose a contract void on account of maintenance. *Williamson v. Henley.* 299

8. Defendant took plaintiff by mistake under a bail recognisance, entered into by a person of the same name, and upon discovering the mistake, discharged him after some little delay; defendant having then pleaded the recognisance in bar to an action of trespass brought by the plaintiff for the imprisonment, the Court refused to strike out the plea. *Mc Crandle v. Barwise and Another.* 429
9. Defendant told J. P. that certain oranges of J. P.'s would not have sold so ill if plaintiff had not, before the sale, propagated a report that there were three or four cargoes of oranges then coming to market; whereupon J. P. discontinued employing the plaintiff as he had before been wont :

Plaintiff thereupon sued defendant for injuring him, by stating that plaintiff had caused the loss on J. P.'s oranges, by propagating a report that he (plaintiff) had three or four cargoes of oranges coming to market :

Held, a fatal variance. *Wood v. Adam.* 481

10. Trespass for breaking a close called Lord's Leys. Plea, right on Brockeridge Common, and that Lord's Leys was part of the common. Replication, no right on Lord's Leys.

At the trial, plaintiff admitted that defendant had a right on all Brockeridge Common except the portion called Lord's Leys, and defendant admitted he had no evidence of any exercise of the right on Lord's Leys :

Held, that upon these pleadings and admissions, plaintiff was entitled to judgment. *Maxwell v. Martin.* 522

11. Declaration, that defendant had libelled plaintiff, a proctor, by publishing that he had been suspended three times.

Plea, as to one of the said suspensions, that plaintiff had been once suspended by Sir J. N. :

Held, that the libellous matter was thus divisible, and the plea an answer as to part. *Clarkson v. Lawson.* 587

12. Averment, that defendant accepted a bill, sufficient on special demurrer, although the statute 1 & 2 G. 4, requires an acceptance in writing. *Chalid and Another v. Belshaw.* 529
13. A general plea of bankruptcy under the statute ought to pursue the terms of the statute, and conclude to the country. *Sheen v. Garrett.* 686

POSTEA.

1. Plaintiffs, as owners of messuages in a chapelry, alleged a right to appoint a curate, in virtue of their being charged annually for the repair of the chapel.

The proof being, that the chapel was repaired out of the poor-rate, Held, that the allegation was not sustained.

2. Where the point is reserved at the trial, a nonsuit may be entered on issues found for the plaintiff, notwithstanding there be issues on the same record found for the defendant. *Shepherd and Others v. Bishop of Chester and Others.* 435

POWER.

Where A. B., seized in fee of one moiety of certain premises in the county of S., and tenant for life, with power of appointment by deed or will, of the other moiety, devised as follows:—

"I will give and devise all my freehold estates in L. and county of S., or elsewhere, to my nephew J. R. for life, on condition that, out of the rents thereof, he do from time to time keep such estates in repair;"—Held, that this did not operate as an execution of the power, but passed that moiety only of which testator was seized in fee. *Denn dem. Nowell v. Roake.* 475

PRACTICE.

See PLEADING, 1, 8. EXECUTION. BAIL, 5. VENUE.

1. Where a rule for judgment as in case of a nonsuit, is discharged upon a peremptory undertaking, costs incurred at the sittings, in consequence of notice of trial, are not allowed, unless mentioned in the rule. *Partington v. Wyatt.* 171
2. Service of a writ directed to the chamberlain of Chester, is irregular without his mandate to the sheriff. *Earl of Shrewsbury v. Haycraft.* 194
3. Members of a corporation may be bail in error for the corporation. *Henley v. Mayor and Burgesses of Lyme Regis.* 195
4. Where an affidavit is sworn by two deponents, the names of both must be specified in the jurat. *Houlden v. Fasson.* 236
5. A new rule to plead must be given after amendment of the declaration, although the amendment be on payment of costs. *Addie v. Thomas.* 236
6. Where the defendant died before the application, the Court refused to amend a *f. fa.* by inserting the *testatus* clause. *Philips v. Tanner.* 237
7. Affidavit "that defendant was indebted to

plaintiff on a bill drawn by M. D. upon and accepted by defendant and endorsed by M. D. to plaintiff" (without saying that the bill was drawn payable to order): Held sufficient to hold defendant to bail. *Hughes v. Brett.* 239

8. Where added bail are, upon a discovery made subsequently to their allowance, rejected by the Court, the bail below (their names remaining on the recognisance) are, before the rejection of the bail above, competent to render the defendant. *Rex v. The Sheriff of Middlesex (in the cause of Logan v. Lovel.* 251

9. The process in *quare impedit* is by summons, attachment, and great distress; therefore, where plaintiff proceeded by summons, to which *nil* was returned; then by attachment, which recited that the defendant had been summoned; and then by *distingas*, under which the sheriff was ordered to levy 48l.; the proceedings were held to be irregular. *Sir J. Tyrell, Bart. v. J. T. Jenner, sued with the late Archbishop of Canterbury.* 253

10. The plaintiff, in an action against the acceptor of a bill of exchange, being called on by rule to deliver up the bill on payment of debt and costs, was, by delivery of the instrument, holden to have complied with the rule, although he had rendered it a nullity by considerable erasures. *Tomlins v. Lawrence.* 376

11. Writ returnable the 3d of November instead of "the morrow of All Souls," quashed for irregularity. *Houlden v. Fasson.* 424

12. Return "next after fifteen days of St. Hilary," irregular. *Adcock v. Felton.* 441

13. The lessor of the plaintiff having brought three ejectments in the Court of K. B. for the same property, that Court stayed the proceedings in two, and compelled the plaintiff to confine himself to one, upon certain terms which rendered it probable that in the event he would have to pay the costs; whereupon he brought an ejectment for the same property in this Court. Proceedings therein were stayed. *Doe dem. Carthew and Others v. Brenton.* 469

14. The defendant sent the plaintiff a copy of a bill of exceptions, in order to his concurring in the statement of facts, and, at the same time, sued out a writ of error: Held, that the plaintiff had no right to retain the bill of exceptions, in order to frustrate it, on the ground that the defendant had waived it by suing out a writ of error. *Willans v. Taylor.* 513

15. The decision of a Judge of assize in remanding a prisoner under the Lords' act is final up to that time. *Briggs v. Sharp.* 517

16. Plaintiff had sued defendant for negligence, *per quod* plaintiff became liable to pay certain sums, and lost the custom of A., B., and C.

The cause was referred under an order of N. P., by which plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of plaintiff, who nevertheless sued defendant again, the new declaration differing from the old one, in stating that plaintiff *had* paid the money he before alleged himself *liable* to pay, and had lost the custom of D., E., and F. :

Held, that the Court could not stay proceedings on a summary application. *Dias v. Jay.* 519

17. Demand of particulars of a notice of set-off delivered after a plea which was a nullity: Held, no waiver of the plaintiff's right to sign judgment. *Ford v. Bernard.* 534
18. The sheriff, without previously requiring an indemnity, seized, under an execution issued by A. against L., goods which were in the possession of plaintiff under a bill of sale from L., notwithstanding notice of the bill of sale. He then applied to A. and plaintiff severally for an indemnity before proceeding further, but both refused, and the plaintiff sued him in trespass for the seizure.
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21. The sheriff may, even after he is in contempt for not bringing in the body, put in bail to surrender the defendant without the consent of the defendant, and notwithstanding the original bail-piece is still on the file. *Hamilton v. Jones and Others.* 628
22. When money is paid into the hands of the sheriff in lieu of bail, the defendant has, under 7 & 8 G. 4, c. 71, till the day for perfecting special bail for giving notice of his intention that the money shall remain in court to abide the event of the suit. *Rowe v. Seftly.* 634
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Plaintiff, a prisoner, assigned all his effects, under the insolvent debtors' act, June 17; his wife continued to reside in his house, retaining some of the furniture. On the 9th July, the wife having been absent for two days, and no one being in the house, defendant committed a trespass in an attempt to distrain for rent: Held, that the wife had not a sufficient possession to enable the plaintiff to sue in trespass. *Topham v. Dent.* 515

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END OF VOL. VI.

REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

King's Bench and Common Pleas,

AND ON

The Circuit;

FROM THE SITTINGS AFTER TRINITY TERM, 1829, TO THE SITTINGS IN
TRINITY TERM, 1831.

BY F. A. CARRINGTON & J. PAYNE, ESQs.,
OF LINCOLN'S INN, BARRISTERS AT LAW.

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CASES
AT
NISI PRIUS.

COURT OF KING'S BENCH.

SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

CLERMONT *v.* TULLIDGE. July 9.

If a witness, called for the plaintiff, in his cross-examination admit that a letter was written by him with the authority of the plaintiff, but deny that a second letter is of his handwriting; the defendant's counsel will not be allowed to show both letters to another witness, called for the plaintiff, and ask him whether he does not believe that the second letter was written by the same person who wrote the first.

MONEY lent. Plea—General issue. A witness, who was called for the plaintiff, stated, that he was present when a sum of 20*l.* was advanced by the plaintiff to the defendant. This witness stated that he was in the habit of writing letters for the plaintiff; and he admitted that a letter, put into his hand, was written by him by the direction of the plaintiff, and signed by her. The defendant's counsel then put another letter into his hand, which he said was not written by him, and he stated that he did not believe that it was written or signed by the plaintiff. A second witness being called for the plaintiff,

Wyborn, for the defendant, wished to show both the letters to this witness, and to ask him whether, in his belief, the two letters were not both of the same handwriting.

*2] Lord TENTERDEN, C. J. I think that that question *cannot be put. It was formerly held, that persons conversant with handwriting could be asked whether certain letters were genuine or not; but it has been since held, that that is not evidence.

Wyborn. I do not propose to ask whether the second letter is a genuine letter or not, but whether the witness believes that the second letter was written by the same person who wrote the first.

Lord TENTERDEN, C. J. I think that the question cannot be put.
Verdict for the plaintiff.—Damages, 20*l.*

Chitty, for the plaintiff.

Wyborn, for the defendant.

[Attorneys—*Delmar*, and *Frowd & R.*]

It is an established rule of evidence, that handwriting cannot be proved by comparison of the paper in dispute with papers acknowledged to be genuine, except in cases where the antiquity of the writing makes it impossible for a witness to swear that he has seen the party write; and, in such case, it has been held sufficient that the witness should have become acquainted with the person's mode of signing his name, by inspecting other ancient writings which bear the same signature, provided those writings have been treated as authentic documents.

ments In the case of *Roe d. Brune v. Rawlins*, 7 East, 282, n. (a), the writing in dispute, which was about seventy years old, was proved by comparison with the signature to a deed of settlement. And in the case of *Morewood v. Wood*, 14 East, 327, a writing, also about seventy years old, was proved by comparison with the signature to the party's will. In the case of *Goodt d. Revett v. Braham*, 4 T. R. 497, which was a trial at bar, an inspector of franks was allowed to give his opinion whether the paper in question was written in a natural or an imitated character; but he having stated that, in his opinion, it was not a genuine handwriting, the Court would not allow a paper, written by a particular person, to be shown to him, for him to state whether the instrument in dispute was written by the same person. So, in the case of *Rex v. Cator*, 4 Esp. 117, Mr. Baron Hotham allowed an "inspector of franks to be asked, [3] whether the writing was in a natural or a fictitious hand, but would not allow him to look at some other writing (admitted to be the defendant's), and then to be asked whether the same person wrote both. However, in the case of *Gurney v. Langlands*, 5 B. & A. 331, where an inspector of franks was called, to state whether a signature was genuine or an imitation; Mr. Baron Wood rejected the evidence, and the Court of King's Bench refused a new trial, the Court having great doubt whether this was legal evidence, and saying, that even if it was, it would be entitled to no weight. In the case of *Carey v. Pitt*, M. P., 3 Pea. N. P. C. 130, Lord Kenyon would not allow an inspector of franks to be asked whether a signature was a genuine handwriting. In that case, it was proposed to prove the defendant's acceptance to a bill of exchange by the inspector of franks, who stated that he had repeatedly seen franks in the defendant's name pass the post office (he being a member of parliament); and that, from the character in which those franks were written, he believed the acceptance to be of the defendant's handwriting; but Lord Kenyon held that this was not admissible.

DOE on the demise of RAINS v. KNELLER. July 9.

If, by a written agreement, A. agrees to let, and B. to take a messuage from a day past, for a term of ten years, "at and under the rent of 80*l*." This is an agreement by B. to pay a rent of 80*l*.; and therefore if there be a power of re-entry in case of a breach of "any of the agreements therein contained," A. has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent.

EJECTMENT to recover a house, situate in the parish of Christ Church, Spitalfields.

The defendant was tenant of the lessor of the plaintiff. It was proved that three quarters' rent was in arrear, and that there was no sufficient distress upon the premises. (a) *The agreement (not under seal) under which the de- [4] fendant held the premises, was put in. It was in the following form:—

(a) By the stat. 4 Geo. 2, c. 28, s. 2, it is enacted, "That in all cases between landlord and tenant, from the 24th day of June, 1731, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage; or, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the Court where the said suit is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, counter-availing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case, the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall permit and suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed; then, and in such case, the said lessee or lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if, on such ejectment, verdict shall pass for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited therein, except for the defendant or defendants not confessing lease, entry, and ouster, then, in every such case, ^{sec 1} the defendant or defendants shall have and recover his, her, and their full costs: Provided always

*5] *“Articles of agreement, made the 1st day of January, 1828, between Henry Rains, of, &c., of the one part; and William Godfrey Kneller, of, &c., of the other part. The said Henry Rains hereby agrees to demise by a lease to, and the said William Godfrey Kneller agrees to take a lease, and execute a counterpart thereof, of all that messuage, situate, &c., to hold the same from the 29th of September, now last past, for ten years and three quarters, wanting twenty-five days, at and under the clear yearly rent of 80l. payable quarterly, on the usual days of payment of rent, the first quarterly payment thereof to become due on the 25th day of March, 1828. And the said William Godfrey Kneller doth hereby agree from henceforth to repair, and keep repaired, the said messuage, &c.; and also to insure and keep insured, the said messuage, &c., in some Insurance Office in London, in the sum of 500l. And it is hereby also further agreed, in case the yearly rent hereby reserved, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days next after any of the before-mentioned days appointed for payment thereof, the said Henry Rains, his executors, administrators, or assigns, shall have the like power of distress for such rent in arrear, as if the lease had been granted to him the said William Godfrey Kneller, by the said Henry Rains, of the premises hereby agreed to be demised; and also shall have the like power of re-entry upon the premises, in case of a breach of any of the agreements herein mentioned, on the part of the said William Godfrey Kneller, his executors, administrators, or assigns, as aforesaid. In witness, &c.*

Carrington, for the defendant. I submit, that, under these articles, there is no power of re-entry for non-payment of rent. The power of re-entry is only for
 *6] *the breach of any of the agreements therein mentioned; now, there is no agreement to pay rent, and the only agreements on the part of the tenant are, to repair and to insure; and it could hardly have been meant, that the payment of rent should be one of the agreements, the breach of which was to incur a forfeiture, because it is stipulated, that, if the rent is unpaid for twenty-one days, the landlord may distrain. Now, if the non-payment of rent gives the landlord a right to re-enter, he might put an end to the whole term the moment that any rent was in arrear, although he would not be entitled to distrain for his rent till after the lapse of twenty-one days.*

*Lord TENTERDEN, C. J. I think that the words, “at and under the rent of 80l. a year,” constitute an agreement; and I think, that the lessor of the plaintiff might have maintained *assumpsit* for the rent in this agreement. I think, also, that it is not quite clear that the words “like power of re-entry,” were not meant to apply to cases where the rent was in arrear for twenty-one days. This is a very confused agreement, but the lessor of the plaintiff is entitled to recover.*

Verdict for the plaintiff.

Comyn, for the lessor of the plaintiff.

Carrington, for the defendant.

[Attorneys—Rains, and Ewington and Chilcote.]

that nothing herein contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession, so as such mortgagee or mortgagees shall and do, within six calendar months after such judgment obtained, and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, person or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements, which, on the part and behalf of the first lessee or lessees, are and ought to be performed.”

*ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1829. [7]

BEFORE LORD TENTERDEN, C. J.

HUMPHREYS v. MILLER. July 14.

If a libel, purporting to be a circular, written by the secretary of a society for the protection of trade against swindlers, impute certain specific facts to the plaintiff; a witness cannot be asked what he understands by finding a person's name inserted in such a circular; but he may be asked whether there is any meaning in such a circular, beyond what appears on the face of it. If the members of such a society agree to contribute towards all law expenses respecting it, and an action be brought against the secretary of it for a libel, it seems that a member of the society is a competent witness for the defence, because an agreement by parties, that they will bear each other harmless in doing wrong, is void. In this case a member of the society was examined for the defence, but the secretary released him before he gave his evidence.

LIBEL. The declaration stated, that the plaintiff was a wine-merchant, and Custom-house agent, and that the defendant was used and accustomed to publish certain notices or lists, purporting to contain the names of certain persons, signifying that they had been guilty of fraud in the way of their business, and were unfit and improper persons to be supplied with goods on credit; and that the inserting of the name of a person in such notices or lists, with a statement that bills had been circulated purporting to be accepted by such person, payable at a banker's where he had no account, did signify that such person had been guilty of fraud in the way of his business, and was an unfit person to be supplied with goods on credit; and that the defendant well knowing, &c., published the following libel of and concerning the plaintiff in his said trade and business:

"12th Notice, 1828

Society for the Protection of Trade.—Treasurers, Messrs. Veres, Ward & Co., Bankers, Lombard Street. Solicitor, Mr. Thomas Miller, 22 Ely Place, Holborn.

"Sir,—I am directed to inform you, that William Patterson, schoolmaster, formerly of Staines House, Barbican (*vide* 8th Notice, 1827), also at 28 White Hart Place, *Kennington Lane, as grocer, &c., and more recently of 195 [78] Upper Thames Street, has been convicted of felony, and sentenced to transportation; and that John Wright, formerly acting as shopman to the above William Patterson, late as dealer in wines, grocery, &c., near Maidenhead Bridge, is now residing at Reading, Berkshire.

"I am also directed to inform you, that bills have been circulated, purporting to be drawn by William Crawford & Co., 45 Ludgate Hill, on, and accepted by, Thomas Humphries, 9 Water Lane, Tower Street, made payable at a banker's where he had no account; also, that John George Jelf (*vide* 9th Notice, 1828) has been convicted and sentenced to be transported; and that Jacob Manger, cheesemonger, late of 309 Blackfriars Road (*vide* 11th Notice, 1828), and since of Mount Street, Grosvenor Square, is now in Whitecross Street Prison.

"By order of the committee,

"THOMAS MILLER, Secretary.

"22 Ely Place, July, 1828.

In some of the counts it was charged, that the names of the plaintiff and the other persons were printed in a conspicuous manner, by which it was meant to be imputed, that the plaintiff, by accepting the bill, had been guilty of fraud; and in others, that he was an unfit person to obtain goods on credit. (a)

(a) As it was held in the case of Goldstein v. Foss, 2 C. & P., Add. p. iii., that a declaration for a libel, which did not, on the face of it, import the meaning applied to it, to make it actionable, was bad, without an introductory allegation; the form of such allegation in the different counts of this declaration may be acceptable, as it is believed that no form of the kind is to be found in the printed collections.

First count.—After the general allegation of good character, and an allegation that the plain-

*9] *Pleas—The general issue and two special pleas, the one stating the
 *10] accepting of a bill by the plaintiff, payable at *Messrs. Veres, Ward, &
 Co.'s, which was refused payment; and that the plaintiff made the bill
 payable at the said bankers', without any expectation of having effects there when
 it became due. The other plea of justification was more general in its form.
Replication de injuria.

It appeared that the defendant was the secretary of a society, called "The Society for the Protection of Trade," and that he had sent a copy of the letter in question to every member of that society.

The publication having been proved, the plaintiff's counsel wished to ask one of the witnesses, what he understood by finding a man's name inserted in one of these letters.

Scarlett, A. G. I must object to this. There have been cases where names
 *11] only have been put down, and, *in those cases, evidence was given of what
 was meant; but this letter professes to state specific facts.

F. Pollock, for the plaintiff. In those cases it was stated, that the party was an unfit person to become a member of that society.

Lord TENTERDEN, O. J. That, unexplained by evidence, might mean any-

tiff carried on the business of a wine-merchant and custom-house agent, and had never been suspected of the offences and misconduct, &c., it proceeded as follows:—"That, also, before and at the time of the committing of the grievances by the said defendant, as hereinafter in this and the two next counts mentioned, divers persons had been associated together under the name and description of a 'Society for the Protection of Trade,' and the said defendant, under colour and pretence of being the secretary of the said society, had from time to time published, and caused and procured to be published, and was used and accustomed to publish and cause to be published certain lists or notices, purporting to be made or given by the order of the committee of the said society, and by the said defendant as secretary thereof, containing therein the names of *certain persons*, for the purpose of denoting or signifying, that the said last-mentioned persons had been guilty of *fraud* in the way of *their trade or business*, and were unfit or improper persons to be supplied with goods on credit, and in which said lists or notices so published and caused to be published by the said defendant, as aforesaid, the names of the said last-mentioned persons were printed in a conspicuous manner; and before and at the time of the committing of the grievances by the said defendant, as hereinafter in this and the next two counts mentioned, the printing and publishing, and causing to be printed and published by the said secretary of the said society, in one of the said notices or lists, of the name of a person engaged in trade or business, in a conspicuous manner, as aforesaid, together with a statement, that bills had been circulated, purporting to be drawn on and accepted by such person, payable at a banker's where he had no account, did import and signify, that the said person had been guilty of fraud in the way of his said trade and business, and was an unfit and improper person to be supplied with goods on credit." That the defendant, well knowing the premises, but greatly envying, &c., published of and concerning the plaintiff, in the way of his said trade, the libel in question. The whole notice was set out with innuendoes, and the count then proceeded as follows:—"In which said libel the words William Patterson, John Wright, W. Patterson, William Crawford & Co., Thomas Humphries, John George Jelf, and Jacob Manger were printed in a conspicuous manner, and thereby then and there meant to insinuate and cause it to be suspected and believed of and concerning the said plaintiff, that the said plaintiff had been guilty of fraud in accepting and being privy to the circulation of bills of exchange, made payable at a banker's where he had no effects or account, and was unfit to be trusted with goods on credit in the way of his said trade and business as aforesaid."

The *second* and *third* counts set out parts of the libel, without any prefatory allegation, and merely stated, "that the said defendant, as such secretary as aforesaid, contriving, and intending further to injure," &c.

The *fourth* count was similar to the first, except, that it imputed, that the insertion of the names in the lists signified that the persons were unfit and improper persons to be supplied with goods on credit in the way of their trade and business, instead of saying that they had been guilty of fraud.

The *fifth* count was similar to the second, only having the like alterations.

The *sixth* count was:—"That before and at the time of committing of the grievances by the said defendant as hereinafter in this and the next count mentioned, the said defendant had been and was the secretary of a society for the protection of persons engaged in trade; and as such secretary, the said defendant, before the time of the committing of the grievances by the said defendant, as hereinafter in this and the next count mentioned, had been used and accustomed to publish lists for the use of the members of the said last-mentioned society, containing therein the names of persons who had been guilty of fraud in the way of their said trade and business, and were on that account unfit and improper persons to be supplied with goods on credit in the way of their said trade or business as aforesaid. Yet the said defendant well knowing the premises," &c. It then set out the part of the libel that respected the plaintiff, with innuendoes; and there was another count with this prefatory allegation, but stating, that the inserting of the names in the list imputed that the persons were unfit and improper persons to be trusted and dealt with on credit in the way of their said trade and business.

thing, and it does not necessarily impute dishonesty. It might be, that the party was an ill-tempered man, and that they, therefore, did not like him to belong to their club. This letter does not state anything obscure, or anything that requires explanation. It states, as a fact, that a particular person has drawn bills, under particular circumstances.

Brougham, for the plaintiff. We wish to show, that, independently of what is stated in the letter, the mere circumstance of a person's name being put in this list has a meaning.

Lord TENTERDEN, C. J. In the case of *Goldstein v. Foss*, 2 C. & P. 252, and Add. iii, several persons were said to be unfit to become members of a society, without more; but here the difference is manifest: this letter professes to state distinct specific facts as to each person.

F. Pollock. I wish to ask the witness, whether there is any meaning in this letter beyond what appears on the face of the paper.

Lord TENTERDEN, C. J. I will allow you to ask that if you choose.

The question was put; but the witness stated, that he *was not aware of any meaning beyond that which the words imported. [*12]

For the defence, Mr. Eaton, one of the members of the society of which the defendant was secretary, was called. He admitted, on the *voire dire*, that he would be liable to pay a share of the expenses of this cause, as there was a rule of the society, that the subscribers should contribute to all law expenses.

Brougham, for the plaintiff, objected that the witness was interested.

Scarlett, A. G., *contrd.* This agreement among the subscribers is good for nothing. If this letter is a libel, and a judgment passes for the plaintiff, Mr. Miller is a wrong-doer, and cannot recover over, there being no contribution among wrong-doers.

Brougham. This is not a case of contribution. These parties are bound to bear each other harmless.

Lord TENTERDEN, C. J. A contract between parties, that they will bear each other harmless in doing wrong, is void. However, if this party would be liable for a share of the expenses, in the event of a judgment passing against the present defendant, he is incompetent.

F. Pollock. Though between *tort feasons*, there is no contribution, would not the law enforce an agreement of this kind where the wrong was accidental?

Scarlett, A. G. The rule of this society is, that the members shall contribute to all expenses. Now, that must be taken to mean legal expenses, and not expenses incurring by publishing libels. If this is an innocent publication, this witness may be liable to contribute towards *the costs; but if it be a libel, Mr. Miller cannot recover over. This witness has, therefore, an interest to make it out a libel; and, therefore, he comes now to speak against his interest. [*13]

Lord TENTERDEN, C. J. I think it a very doubtful matter; there is a great deal of doubt. I should, therefore, be disposed to receive the evidence.

Before the witness was examined, Mr. Miller gave him a release.

Lord TENTERDEN, C. J. That will prevent Mr. Miller from calling upon the witness, but it will not prevent any of the other members from doing so, unless, indeed, it prevents Mr. Miller from suing any of them.

Mr. Eaton was examined.

For the defence, evidence was given in support of the pleas of justification.

Verdict for the defendant.

Brougham, *F. Pollock*, and *Kelly*, for the plaintiff.

Scarlett, A. G., and *Follett*, for the defendant.

[Attorneys—*J. Harrison*, and *T. Miller*.]

*14] *POCOCK v. RUSSELL, Gent. July 10.

Where an attorney is employed by one person to sue out a commission of bankrupt on the petition of another person, the person so employing the attorney, and not the petitioning creditor, is the person liable to pay the attorney the costs of suing out the commission.

ASSUMPSIT for goods sold and delivered. The defence was a set-off; and it appeared that the defendant, who was an attorney, had been employed by the plaintiff to sue out a commission of bankrupt on the petition of a person named Wilkins; and his bill for procuring the commission came to more than the amount of the plaintiff's claim.

Scarlett, A. G., for the defendant, contended that, under these circumstances, the defendant was entitled to a verdict.

F. Pollock, for the plaintiff, submitted that Wilkins, and not the plaintiff, was liable to pay for the commission. He cited *Finchett v. How*, 2 Camp. 275; (a) in which Lord Ellenborough held, that the petitioning creditor and another could not be sued jointly; and contended that *a fortiori*, a third person could not be sued alone.

*15] *Lord TENTERDEN, C. J. Wilkins, in this case, never was liable, and never could be made liable. The plaintiff is the employer of the defendant, and must pay him. Therefore, the defendant is entitled to the verdict.

Verdict for the defendant.

F. Pollock and *Starkie*, for the plaintiff.

Scarlett, A. G., and *Hutchinson*, for the defendant.

[Attorneys—*T. Pocock*, and *In person*].

(a) That was an action by the solicitor, against two persons who had been chosen assignees of a bankrupt, to recover the costs of suing out the commission; one of the defendants was the petitioning creditor, and it was objected that, as the petitioning creditor was, by the act of Parliament, 5 Geo. 2, c. 30, s. 25, to sue out the commission, "at his own costs and expenses," another person could not be jointly liable with him. For the plaintiff it was contended, that if both the defendants had retained the plaintiff to sue out the commission, both would be liable to pay him: But Lord Ellenborough said, that the words were express, that the petitioning creditor should sue out and prosecute the commission, till the choice of assignees, at his own costs and expenses: and that these costs and expenses, therefore, could not be recovered in a joint action against him and another person.

The case of *Finchett v. How*, was decided on the stat. 5 Geo. 2, c. 30 (now repealed); but, by the bankrupt act, 6 Geo. 4, c. 16, s. 14, it is enacted, "that the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees," &c.

LOMI v. TUCKER. July 10.

A. sold to B. for 95l. two pictures, representing them as "a couple of Poussin's." They were, in fact, not originals, but very excellent copies; B. did not offer to return them:—*Held*, that if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon; but that, as he kept them, he was liable to pay such sum as the jury might consider to be the value.

ASSUMPSIT for the price of various articles of *virtu*, and among them two pictures, charged in the particulars of demand as having been agreed for at 95l. The plaintiff was an Italian doctor, and the defendant an attorney. It appeared that the plaintiff had represented the pictures in question as "a couple of Poussin's." It was admitted, that they were not originals; but it was contended, on the part of the plaintiff, that the price would show that they were never intended to be sold as originals, which would be of much higher value, and that they were only sold as very good copies.

Lord TENTERDEN, C. J., left the question to the Jury, saying—If you think that the defendant bought these pictures, believing, from the plaintiff's representation, that they were original pictures painted by Poussin, then I am of opinion that the defendant is not bound by his bargain.

Gurney, for the plaintiff. The defendant has not offered to send the pictures back.

*Lord TENTERDEN, C. J. If he had returned them, I should have thought that you could not recover anything; but as he has not, I think you are entitled to recover whatever the Jury may think to be the value [16]

Some money had been paid into Court, and the Jury found a Verdict for the defendant.

Gurney and Busby, for the plaintiff.

J. Williams, for the defendant.

[Attorneys—*English & D.*, and *In person*.]

See the cases of *Milner v. Tucker*, 1 C. & P. 15, *Percival v. Blake*, 2 C. & P. 514, and *Cash v. Giles*, 3 C. & P. 407.

MIDDLETON and Another v. FROST. July 28.

In an action against the surety of a collector of rates, to recover sums received and not paid over by the collector, an inhabitant of the place is admissible *ex necessitate* to prove payments to the collector, although, in the event of the surety's failing to make good the deficiency, he would be liable to a fresh assessment.

DEBT. The declaration stated, in substance, that the defendant, in the lifetime of one Squire, who was collector of rates for the second division of the bishop's liberty of East Brixton, became surety for the due payment by him of the sums collected; and that Squire collected certain sums, and did not pay them over, whereby the defendant became liable to make good the deficiency. Pleas—*Non est factum*, and several special pleas.

To prove the payment of some rates to Squire, as collector, an inhabitant of the division was called.

Brougham, for the defendant, objected that he was an interested witness.

Lord TENTERDEN, C. J. You say he is not competent; and if any one else were called, you would say that this *witness was the only person who could prove the fact. This verdict will not be evidence either for or against him. [17]

Brougham. If there should be a new assessment, and a refusal to pay, then it must be shown that they had failed to recover against the surety of the collector.

Lord TENTERDEN, C. J. I think he is competent, from the necessity of the case. If his evidence is not received, there will be no proof at all.

Verdict for the plaintiff.

Scarlett, A. G., *Gurney*, and *Hutchinson*, for the plaintiffs.

Brougham and *Chitty*, for the defendant.

[Attorneys—*Marson & S.*, and *Dodd*.]

REEVE *qui tam* v. STAREY and Others. July 29.

Where the vender of coals himself inserts in the vender's ticket the description of them, it is not necessary, in an action for penalties under the 47 Geo. 3, c. lxviii., to produce the ship-meter's certificate, required by the 55th section of that statute.

DEBT for penalties under the statute 47 Geo. 3, sess. 2, c. lxviii.(a) The declaration stated that the defendants, being venders of and dealers in coals, did,

(a) Sect. 33 of this statute, enacts, "that if any venders of or dealers in coals, shall knowingly sell one sort of coals for and as a sort which they are not, within the port of London, &c. &c., such venders or dealers shall forfeit and pay for every such offence the sum of 20*l.* per chaldron."

within the city of London, &c., knowingly and wilfully, sell to one R. A. Coward one sort of coals, for and as a sort of coals which they really were not; that is to say, five chaldrons of a sort of coals called "Eden Main coals," for and as a *18] sort of coals called "Stewart's Walls-end coals;" the same coals so sold as aforesaid, then and there being coals of another and different sort from coals of the said sort called "Stewart's Walls-end coals," contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the said defendants then and there forfeited, and became liable to pay, for their said offence, the sum of 20*l.* per chaldron, for each and every of the said chaldrons of coals, so sold by the said defendants as aforesaid, then and there amounting to a large sum of money, to wit, the sum of 100*l.* &c.: and thereby, and by force of the statute, &c., an action accrued to the plaintiff, &c. Plea—*Nil debet.*

From the evidence it appeared, that, in the month of July, 1828, the defendant Starey applied to a Mr. Coward, living in Cheapside, and wished him to buy some coals. He agreed to purchase a room of the *best Walls-end*, at 45*s.* a chaldron, for ready money. On the 18th July the coals were delivered, and two or three days afterwards, another of the defendants, named Grellier, called and brought a bill of parcels; Mr. Coward told him, that the coals were not the sort that he had ordered; Mr. Grellier replied, that they were as good, because they had been sifted. The only difference between Eden's Main, and Stewart's Walls-end coals is in the size. The tickets which were sent with the coals, had originally contained the words "*Eden's Main*;" but there were written over them the words "*Stewart's Walls-end*." Both these were in the handwriting of Mr. Grellier, as were the words "Starey, Grellier, & Co.," which were on one of the tickets.

A labouring ship-coal-meter proved that, on the 4th of July, he delivered four rooms of Eden's Main coals from a ship called the *Blagden*, into a barge called the *Hogarth*; and that he made out a certificate of the quantity and description of the coals, which was signed by the master of the vessel, and given *19] to the lighterman to take to the wharfinger. (a) This certificate was not produced, but a person from the cocket-office produced the fitter's certificate of the general cargo of the ship *Blagden*, which was of two hundred and thirty chaldrons of Eden's Main coals; and a land-coal-meter, stationed at Pearson's wharf, where the defendants were in the habit of drawing their coals, proved that, on the 17th of July, five chaldrons of Eden's Main coals were taken from the barge *Hogarth*, and loaded into two wagons, to be taken to Mr. Coward's on the following morning. The witness added, that he made out the meter's tickets, and countersigned the vender's tickets; and that he wrote the words "*Eden's Main*" in the meter's tickets after they had been written in the vender's tickets by the defendant Grellier.

Campbell, for the defendants, submitted that, upon this evidence, there was no case to go to the Jury. By the 55th section of the 47 Geo. 3, sess. 2, c. lxxiii., the certificate of the ship-meter must be delivered to the lighterman; and it is only by means of this certificate that the coals can be identified. (b) They were lost sight of from the 4th of July, when they were taken from the ship, till the 17th, when they were taken from the barge; and, without the certificate, the chain of evidence is broken, and there is no proof that they were the same coals.

Lord TENTERDEN, C. J. According to the evidence, the defendant Grellier writes the tickets himself, and he calls them Eden's Main Coals. I am of opinion that this supplies the want of the certificate. I think there is quite enough to identify the coals.

Campbell then addressed the Jury for the defendants, and contended that no fraud was meditated or attempted. The act says, if any person *knowing-* *20] *ly* shall sell, &c. *Now, this might be a mistake on the part of Mr.

(a) This is required by s. 55 of the 47 Geo. 3, sess. 2, c. lxxiii.

(b) Vide also sect. 92, post, p. 20, note (a).

Grellier; and there is no evidence at all to affect either of the others. There is no evidence of the coals being Eden's Main. The meter's certificate is not here; and Mr. Grellier might have discovered, between the afternoon when the wagons were loaded, and the next morning when they went out, that he had made a wrong insertion, and he might have made the alteration in consequence. There is not that satisfactory proof which is necessary to support an action to recover penalties.

Lord TENTERDEN, C. J., (in his summing up), said—The single question is, whether these coals were sold as a different and better sort than they were. The defendant, Grellier, when told by Mr. Coward, that the coals were not those he ordered, does not say that they are not of a different quality, but he says that they are as good. From the evidence, it is clear, that a cargo of Eden's Main coals, came in the ship Blagden; and that, on the 5th of July, a portion of these coals was put into the barge Hogarth. Thus far it is all clear. Then there is the evidence of the land-coal-meter, who proves the entry in the ticket, in the handwriting of the defendant Grellier. If that entry had been of a wrong sort, the land-meter would have detected the error, and would have set Mr. Grellier right.^(a) He was therefore obliged to put it in correctly. If this satisfies you that Mr. Grellier, at least, knowingly committed this fraud, then you will find your verdict for the plaintiff; if on the contrary, you will find for the defendants.

Verdict for the plaintiff,—100*l*.

*Scarlett, A. G., Denman, C. S., Bolland, and Patteson, for the plaintiff. [21]
Campbell, and Platt, for the defendants.

[Attorneys—W. L. Newman, and Stevens & Co.]

(a) By the 92d section of the act before mentioned, it is provided that the land-coal-meter may demand from the wharfinger a sight of the *ship certificate*, in order that he may be satisfied that the coals sent from any wharf in wagons or other carriages, are of the sort or description mentioned in the tickets, by the act directed to be delivered by the vendor to the purchaser; and the meter, if satisfied, is to countersign the vendor's ticket.

FURTHER ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

CROPLEY v. CORNER. Oct. 19.

Action by the endorsee against the acceptor of a bill of exchange; the defendant had taken the benefit of the Insolvent Debtors' Act, and had set down the drawer as a creditor, in his schedule:—*Held*, that the drawer was, notwithstanding this, a competent witness for the plaintiff in this action.

ASSUMPSIT by the plaintiff as endorsee of a bill of exchange, drawn by a person named Marshall, payable to his own order, on and accepted by the defendant. The bill had been endorsed by Marshall to the plaintiff. Plea—General issue.^(a)

To prove the acceptance, the drawer was called; he stated on the *voir dire*, that the defendant had taken the benefit of the Insolvent Act, and that he (the witness) was named as a creditor in the schedule.

Thesiger, for the defendant. This person is not a competent witness. He cannot sue the defendant, because his debt is in the defendant's schedule; but he is still liable to the plaintiff. His interest, therefore, is, to let the plaintiff recover as much as possible from the defendant, to lessen his own liability. In

(a) There was no plea under the Insolvent Debtors' Act. See the case of *Niss v. Nicholson*, 2 C. & P. 120.

ordinary cases, the drawer is a good witness, because he can recover over; but, in *the case of an accommodation bill, the drawer cannot recover over, and he is not a competent witness.

Lord TENTERDEN, C. J. I think that the drawer is a competent witness in this case. A judgment against the present defendant would be no bar to a future action against the drawer. I think he may be examined.

The drawer was examined.

Verdict for the plaintiff.

Chitty, for the plaintiff.

Thesiger, for the defendant.

[Attorneys—*Garry*, and *Pratt*.]

JELF, Knt., v. ORIEL and Another. Oct. 20.

The Judge, at the trial, will not allow an amendment under the stat. 9 Geo. 4, c. 14, when there is a variance which would not have occurred if common care had been used in the drawing of the declaration.

ASSUMPSIT on a bill of exchange, for 200*l.*, dated May 19th, 1828, drawn by the defendants on Lord Audley, and by them endorsed to the plaintiff. Plea—General issue.

The first count of the declaration stated, that the bill was accepted by Lord Audley, "payable at Sir James Esdaile & Co.'s, Bankers, London, or at No. 18, Poland Street, Oxford Street."

The witness, who proved the acceptance to be of Lord Audley's handwriting, stated, that the words, "or at No. 18, Poland Street, Oxford Street," were not of his Lordship's handwriting; indeed, it was manifest that those words had been added afterwards.

Denman, for the defendant, objected that this was a variance.

**Campbell*, for the plaintiff. I trust that we may be allowed to amend this under the stat. 9 Geo. 4, c. 14.(a)

Lord TENTERDEN, C. J. I do not think this is a case in which I ought to allow it. This is not one of those cases, where there has been a verbal mistake in setting out some long written document.

Campbell. The plaintiff has given value for this bill, and the present objection is founded on a mere mistake in the drawing of the declaration; this seems to be the very case contemplated by the act. Formerly, there was a reproach on the law, that justice was often defeated by a too great strictness on these points, and, to remedy that defect, this statute was passed.

Lord TENTERDEN, C. J. The object of that act of Parliament was to prevent a failure of justice from accidental errors. Now, this is a blunder which no man could make who would but use his eye-sight. I have always thought that we have gone too far from the strict rules, for the purpose of attaining justice in some particular case; the consequence of which has been, that those cases having been quoted as precedents, great laxity has been introduced into the practice.

Campbell. I apprehend that this bill is evidence on the count for an account stated; there is a privity between these parties, they are endorsee and endorser, and there is no intervening party.

Lord TENTERDEN, C. J. The bill is no doubt evidence for all purposes except to support this count.

*The case proceeded on the account stated, and the defendants' counsel wished to show that the bill had been paid to the plaintiff by a person named Hurd; and that the bill therefore passed through the hands of an in-

(a) This act will be found, 3 C. & P. 298, n. (2). See the case of *Ryder v. Malbon*, 3 C. & P. 594, and *Bentzing v. Scott*, post, p. 24.

intermediate party before it was in the possession of the plaintiff. But it being shown that Mr. Hurd was merely acting as agent of the defendants, there was a

Verdict for the plaintiff.—Damages 200*l*.

Campbell, and *Brodrick*, for the plaintiff.

Denman, and *R. S. Richards*, for the defendants.

[Attorneys—*W. R. King*, and *Oriel & L.*]

THIRD SITTING IN LONDON, IN MICHAELMAS TERM, 1829.

D.R. MR. JUSTICE J. PARKER.

BENTZING v. SCOTT. Nov. 27.

In a declaration on a bill of exchange, the date of the bill was stated to be the 26th of March; it really was the 29th. The cause was undefended, and the judge allowed the variance to be amended under the stat. 9 Geo. 4, c. 14, without the payment of any costs.

ASSUMPSIT by the plaintiff as endorsee, against the defendant as the acceptor of a bill of exchange.

The cause was undefended. But when the bill was put in, it was discovered that the date of it was the 26th of March, 1829, and that, in the declaration, the date was stated to be the 29th of March, 1829.

Mr. Justice J. PARKER, allowed this to be amended under the stat. 9 Geo. 4, c. 14, without payment of any costs.

Verdict for the plaintiff.

Thesiger for the plaintiff.

[Attorneys—*D. Willoughby*, and *Scott*.]

*ADAMS v. SAUNDARS. Oct. 23.

[*25

If a policy of insurance be produced by the agent of the plaintiff, through whom it was effected, and the defendant's name be struck out, and have written against it, "adjusted the general and particular averages at 30*l*. 9*s*. per cent.;" this is proof that the policy has been adjusted, but not that it has been satisfied: but the plaintiff will not be allowed to go into evidence to show that some of the sums allowed at the time of the adjustment were too small. If the plaintiff could show that the loss was settled without his authority, or perhaps if he could show that some sum was entirely omitted, he might go beyond the amount of the adjustment.

ASSUMPSIT on a policy of insurance, underwritten by the defendant for 200*l*., on the ship *Earl of Dalhousie*, and also on the goods and freight at and from Quebec to Liverpool. In some of the counts of the declaration, the plaintiff declared upon a total loss, and in others for an average loss. (a) There were also the money counts, and an account stated. Plea—General issue.

The policy, which was produced by a clerk of Messrs. Brown, Logan, & Co., through whom it was effected, was put in; and it appeared that the defendant's signature had been struck out, and the following memorandum written against it: "Adjusted the general and particular averages at 30*l*. 9*s*. per cent." To this memorandum the defendant had put his initials.

Scarlett. A. G., for the defendant. I submit that the plaintiff must be nonsuited. The policy is produced by a clerk of Brown, Logan, & Co., through whom it was effected, and it appears on the face of it to be satisfied. If the name of the underwriter is struck out, it is to be presumed that the amount found to be due has been paid. Now, as this policy is produced with the usual

(a) None of the counts stated that the loss had been adjusted.

tokens of adjustment and payment upon it, the plaintiff must show that some fraud was practised on him to let in the question whether it has been satisfied or not. If a party leaves his policy with the insurance broker, and lets him settle the loss, he cannot, after that, sue the underwriter; and if the broker acts improperly, his remedy is against the broker. After a policy is adjusted, it cannot be opened unless there has been a fraud; and as that cannot be presumed, the party who seeks to open the question, must begin by proving fraud.

*26] *Campbell*, for the plaintiff. Looking at this policy, there is no proof of payment. We bring actions against the different underwriters, and they enter into a consolidation rule, and by that they admit the policy. Now, that is not admitting it as a satisfied policy; but, as I submit, they admit the policy by the consent rule, and so put us in the same situation as if the name had not been struck out, and we had proved it to be of the handwriting of the defendant.

Lord TENTERDEN, C. J. This no doubt shows a settlement, but not a payment.

Scarlett, A. G. The name would not be struck out unless the money were paid.

Lord TENTERDEN, C. J. I believe they strike out the name when they adjust, and then pay the amount in a month or six weeks after. I think, as this policy comes out of the hands of the agent who effected it, I must take all this to have been done by the authority of the plaintiff, till the contrary is shown. This, therefore, shows a settlement of the amount, but not a payment.

Campbell, for the plaintiff, wished to show, that, in the adjustment, too small a sum had been allowed.

Lord TENTERDEN, C. J. I cannot allow that to be done, unless it can be shown that the settlement was made under such circumstances as to make it not binding on the plaintiff. I think that you must show that this adjustment was made without authority; or, perhaps, if some sum were shown to be wholly omitted, you might be allowed to open it; but not because the amount allowed is not sufficiently large. I do not see of what use an adjustment would be, if it could be opened.

For the defence it was proved, that the sum of 60*l.* 18*s.* *had been paid *27] by the defendant in account with Messrs. Brown, Logan, & Co., who appeared by the evidence for the defence to be the mortgagees of the ship.

Verdict for the defendant.

Campbell, and *Wightman*, for the plaintiff.

Scarlett, A. G., and *Patteson*, for the defendant.

[Attorneys—*A. Wilson*, and *Taylor & R.*]

On the subject of adjustment, Mr. Justice Park says (Law of Insurance, pp. 192 *et seq.*) "When the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter is liable to pay is settled, it is usual for the underwriter to endorse on the policy, 'adjusted this loss at so much *per cent.*,' or some words to the same effect. This is called an adjustment. It has been held by Lord Ellenborough, that if an agent had subscribed the policy and had authority so to do, he has authority also to sign the adjustment. It has been determined, that, after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into proof of his loss, or any of the circumstances respecting it. This, it is said, has been the invariable custom upon this subject, which seems perfectly just, as the underwriter has, under his hand, expressly admitted, that the plaintiff has sustained damage to a certain amount. To be sure, if a fraud were discovered in obtaining the adjustment, that might be a ground for setting it aside. But supposing the transaction fair, as we must always do till proof is given to the contrary, the rule of not suffering the adjustment to be contradicted, is fair and equitable." In the case of *Hogg v. Gouldney*, Lord Chief Justice Lee said, he considered the adjustment, with an agreement to pay, as a note of hand. But Mr. Justice Park observes (p. 194), that the true rule may perhaps be collected from the cases of *Rogers v. Maylor*, and *De Garon v. Galbraith*. In the former of these cases, Lord Kenyon said, that he did not think it necessary to declare on the adjustment specially, that it was *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact upon which it had been made, the underwriter was not absolutely concluded by it. In the latter, the plaintiff relied only on the adjustment; but the witness who proved it swore, that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay. Upon which, Lord Kenyon said, that, under these circumstances, the *28] "plaintiff must go into other evidences which not being prepared to do, he was nonsuited, and the Court above refused to set aside the nonsuit. As to these cases, Mr. Justice Park says (p. 195) "they all agree that the effect of the adjustment is to throw the *onus probandi* on

upon the underwriter; and if, immediately after signing, doubts arise about the honesty of the transaction, and those doubts are instantly communicated, the assured ought not, with a knowledge of this, and that the same witness who proves the adjustment can also prove the communication of the doubts, to proceed to trial on the adjustment only. In the case of *Hebbert v. Champion*, 1 Camp. 134, Lord Ellenborough said, 'A promise to pay will not, in general, be binding, unless founded on a previous liability. What is an adjustment? It is an admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy; perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove; an underwriter must make a strong case, after admitting his liability; but, until he has paid the money, he is at liberty to avail himself of any defence which the facts or the law of the case will furnish.' It is quite evident, that his Lordship here considered an adjustment as shifting the burden of proof from the assured to the underwriter, but by no means shutting out the latter from any ground of defence which either the law or the facts would supply."

In the case of *Shepherd v. Chewter*, 1 Camp. 275, Lord Ellenborough said, "The adjustment was *prima facie* evidence against the defendant; but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case, unless they were all blazoned to him as they really existed."

One rule relative to adjustments is this—if an insurer pay money for a total loss, and in fact it be so at the time of adjustment, if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured; but substantial justice is done by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage. *Park's Insur.* 198.

***REX v. CLAPHAM.** Oct. 24.

[*29

If a parish register of baptisms state that the person baptized was born on a particular day, that is not evidence of the date of his birth.

INDICTMENT against the defendant, charging that he, with intent to impose on the Court of Examiners of the Apothecaries' Company, and to induce them to examine him for the purpose of his obtaining a certificate to practise as an apothecary, did fraudulently produce a certain instrument in writing, purporting to be an affidavit that he was of the full age of twenty-one years; by means of which he obtained from the Court of Examiners a certificate to practise as an apothecary, whereas, in truth and in fact, he was not then of the full age of twenty-one years, as he then well knew. Plea—Not guilty.

It appeared that, previous to his examination at Apothecaries' Hall, in the month of March, 1828, the defendant had left a paper purporting to be an affidavit, that he was of the age of twenty-one years.

To show that he was not of that age, a witness proved the names of his father and mother, and that they lived at Thorney; and an examined extract of the register of baptisms of the parish of Thorney was put in: this stated the day on which he was baptized, and also the day on which he was born.

LORD TENTERDEN, C. J. The part of it respecting the time of his birth must not be read. This entry is no evidence of that, it is only proof of the baptism.

Evidence was given of a declaration made by the defendant, that he was not of the full age of twenty-one when he obtained his certificate; and his counsel then consented to a verdict of Guilty.

**Scarlett, A. G., and Follett*, for the prosecution.

Brougham, and Kelly, for the defendant.

[*30

[Attorneys—*Bacot, and Fairthorn & Lofty.*]

In the ensuing Term, the defendant was sentenced to be imprisoned for six calendar months.

By the stat. 55 Geo. 3, c. 194, s. 14, it is enacted, that, "from and after the 1st day of August, 1815, it shall not be lawful for any persons (except persons already in practice as such), to practise as apothecaries in any part of England or Wales, unless they shall have been examined by the Court of Examiners, or the major part of them, and have received a certificate of their being duly qualified to practise as such, from the said Court of Examiners, or the major part

of them; who are authorized and required to examine all persons applying to them, for the purpose of ascertaining the skill and abilities of such persons in the science and practice of medicine, and their fitness and qualification to practise as apothecaries; and the said Court of Examiners, or the major part of them, are empowered either to reject such persons, or to grant a certificate of such examination, and of their qualification to practise as apothecaries as aforesaid: provided always, that no persons shall be admitted to such examination until they shall have attained the full age of twenty-one years.

And by sect. 15, it is provided and enacted, "that no person shall be admitted to any such examination for a certificate to practise as an apothecary, unless he shall have served an apprenticeship of not less than five years to an apothecary, and unless he shall produce testimonials to the satisfaction of the said Court of Examiners, of a sufficient medical education, and of a good moral conduct."

***31]** *TENNANT and Others v. STRACHAN and Others. Oct. 24.

If an action be brought against the assignees of a bankrupt, and, before the trial, the bankrupt obtains the signature of a sufficient number of creditors to his certificate, and be willing to release his surplus, but his certificate has not been allowed by the Lord Chancellor; the Judge will not put off the trial to give time to obtain the allowance of the certificate by the Lord Chancellor, so as to make the bankrupt a competent witness for the assignees.

If bills be paid in at a banker's as short bills (i. e. bills which the bankers are to present when due, and carry the proceeds to account), and after a commission of bankrupt has issued against the bankers, but before the choice of assignees, a person, on behalf of the customer by whom they were paid in, calls at the banking-house to demand a return of these bills, the answer he receives is evidence in an action of trover, brought against the assignees for the recovery of such bills: but if, before the choice of assignees, some of the bills were paid, the customer cannot recover the value of such bills as were so paid, in an action of trover against the assignees.

If the assignees, when called on to return the bills, claim a right to retain such as have not been paid, alleging that the bankrupts had discounted them for the customer before the bankruptcy, this is presumptive evidence that these bills were the bills paid in by such customer.

If a customer pay into the hands of his banker certain bills, as short bills, and, after the bankruptcy and choice of assignees, the assignees present them for payment, and receive the proceeds, and claim to hold the proceeds against the customer, they are liable in trover.

TROVER for twenty-seven bills of exchange. **Plea**—Not guilty.

Before the jury were sworn, *F. Pollock*, for the defendants, moved to put off the trial, on the ground that the defendants were the assignees of Messrs. Remington & Co., and that Mr. Remington, one of the bankrupts, was an incompetent witness; he had had his certificate signed by the creditors, and he was willing to release his surplus; but his certificate had not been allowed by the Lord Chancellor; the application, therefore, was to postpone the trial, to give an opportunity of obtaining the Lord Chancellor's allowance of the certificate.

LORD TENTERDEN, C. J. I think I cannot do it. It is too dangerous a precedent. The witness is, at present, not competent, and this is an application to postpone the trial till he is so. I think I cannot do it.

The case opened on the part of the plaintiffs was, that the banking-house of Remington & Co., stopped payment on the 27th of December, 1828; and that the plaintiffs, who were customers of that house, had, on the 24th of December, paid in these twenty-seven bills as what are called short bills (that is, bills that the bankers merely hold for the purpose of presenting when due, and

***32]** carrying the proceeds to account); and that, after the firm of *Remington & Co. had failed, the defendants, their assignees, had refused to deliver up these bills.

A witness proved that, on the 2d of January, 1829, he called at the banking-house of Remington & Co., to ask that these bills should be restored to the plaintiffs, as they had been paid in as short bills.

F. Pollock, for the defendants. At this time a commission of bankrupt had issued against the firm of Remington & Co. What they said is not evidence.

LORD TENTERDEN, C. J. How could the plaintiffs do more? They could only go to the place of business, as no assignees had been chosen.

The witness further stated, that Mr. Remington, sen., said, that the bills would be restored if they had not been discounted, and referred the witness to Messrs.

Martin & Co., who had possession of the bills; but they would not give them up, alleging that they had been discounted. And it was proved by the clerk of Messrs. Martin & Co., that the bills were presented by them as they fell due, and that the proceeds of all those that became due before the 16th of January, 1829, on which day the defendants were chosen assignees, were paid over to the defendants; and that all the remaining bills which were not due, were paid into the Bank of England, by order of the defendants.

Lord TENTERDEN, C. J. You cannot maintain trover against the assignees for those bills which were paid before they were chosen assignees. Those bills never came to their hands.

These bills amounted to 331*l.* The amount of the whole twenty-seven bills being 2,245*l.* 18*s.* 10*d.*

*Another witness proved a demand on the defendants as assignees, and that they refused to deliver up the bills, alleging that Remington & Co. [33 had discounted them for the plaintiffs, and carried the amount, less the discount, to the credit of the plaintiffs' account, on the 24th of December.

F. Pollock, for the defendants. There is no evidence that these bills were ever the property of the plaintiffs, or that they ever sent them to the house of Messrs. Remington. For the purpose of giving a notice, it might be enough to go to the place of business; but, after a commission had issued, the bankrupts could make no admission.

Scarlett, A. G. No suggestion was ever made that these were not the plaintiffs' bills.

Lord TENTERDEN, C. J. There is presumptive evidence that these bills belonged to the plaintiffs, and that they were in the possession of the defendants. As soon as the banking-house shuts, the plaintiffs apply, at the place of business, to one of the partners. They are then sent to Messrs. Martin & Co., where the bills are; but they do not give them up, because they say they were discounted. Now, is all this adopted by the defendants? They draw these bills out of the hands of Martin & Co., which is an adoption of their act; and, when the defendants are applied to, they put the matter upon a ground quite distinct from any objection that the bills never belonged to the plaintiffs.

F. Pollock. The sum of 331*l.* must be taken off for the bills paid before the 16th of January; and, with respect to the others, I submit that the assignees were trustees for all parties, and that it was their duty to present the bills when due; and that, if they did no more than their duty, they are not liable in trover. In a very late case, where bills were given over to a party as a fraudulent preference, *and the defendant had received the proceeds before any demand, [34 the Court of King's Bench held, that the assignees could not maintain trover.

Lord TENTERDEN, C. J. In that case, the legal title was not in the assignees till the demand. They might or might not have rescinded the contract. Here the plaintiffs had the right of property in these bills from the first. In a case like the present, what is a man to do? He makes a demand at the house before any assignees are chosen; and afterwards, when assignees are chosen, he makes another demand on them.

F. Pollock, for the defence, called witnesses to show that these bills had been discounted by Remington & Co. for the plaintiffs, on the 24th of December. This was left to the Jury, who did not think that it was sufficiently made out.

Verdict for the plaintiffs.—Damages, 1914*l.*

Scarlett, A. G., *Campbell*, and *Archbold*, for the plaintiffs.

F. Pollock, *Alderson*, and *Maule*, for the defendants.

[Attorneys—*Leigh*, and *Barrow & Co.*]

*35] *MITCHELL and Another v. BARING and Others. Oct. 26.

A foreign bill of exchange was drawn by A. upon C. & Co., who resided at Liverpool, in favour of L. R. & Co., and by A. endorsed to the plaintiffs. The bill was drawn, "Sixty days after sight, pay to L. R. & Co. in London," &c. It was refused acceptance by the drawee, but accepted under protest for honour of the drawer by the defendants as follows:—"Accepted under protest for honour of L. R. & Co., and will be paid for their account if regularly protested and refused when due." This bill was presented for payment at the residence of the drawees in Liverpool, and protested at Liverpool for non-payment; but it was not presented for payment, or protested, in London, where the drawees had not any house of business:—Held, that the holders were entitled to recover against the acceptors for honour; and that, under these circumstances, a presentment in London and protest there were not necessary.

ASSUMPSIT on a bill of exchange for 500*l.*, dated July 18th, 1825, drawn at Charleston, in America, by James Butler Clough, on Messrs. Crowder & Co. of Liverpool, payable sixty days after sight to Messrs. Le Roy, Bayard, & Co., in London. This bill was endorsed by Le Roy, Bayard, & Co. to the plaintiffs, who resided at Glasgow, and on the 23d of August, 1825, was presented for acceptance; but being refused acceptance, it was duly protested; and on the 12th of September, in the same year, it was accepted by the defendants, for the honour of the drawers, in the form stated below. On the 1st of November, 1825, it was presented to Messrs. Crowder & Co. at Liverpool for payment; and, being refused payment, it was, at Liverpool, protested for non-payment, and notice of such presentment and non-payment was given to the defendants on the 3d of November, on which day payment was demanded of them.

The declaration contained two counts on the bill of exchange,^(a) and the money counts.

(a) As the form of this declaration is not in the printed collections, a copy of it may not be unacceptable. It was as follows:

First count.—"For that, whereas, one James Butler Clough, heretofore, to wit, on the eighteenth day of July, in the year of our Lord one thousand eight hundred and twenty-five, in parts beyond the seas, to wit, at Charleston, that is to say, at London, according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date a certain day and year therein that behalf mentioned, to wit, the same day and year aforesaid, directed to certain persons by the style, firm, and description of Messrs. Crowder, Clough & Co., Liverpool, and thereby requested the said persons, to whom the said bill of exchange was directed as aforesaid, sixty days after the sight of that, his, the said James Butler Clough's, first of exchange (second, third, and fourth, unpaid), to pay to certain persons therein mentioned, to wit, by the style, firm, and description of Messrs. Le Roy, Bayard, & Co., or order, in London, the sum of five hundred pounds sterling, value received, and then and there delivered the said bill of exchange to the said last-mentioned persons. And the said persons, to whom, or to whose order, the payment of the said sum of money, in the said bill of exchange specified, was, by the said bill of exchange, appointed to be made, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, endorsed the said bill of exchange according to the usage and custom of merchants; and, by that endorsement, ordered and appointed the said sum of money, in the said bill of exchange specified, to be paid to the said plaintiffs, or order; and then and there delivered the said bill of exchange, so endorsed, to the said plaintiffs. And the said plaintiffs aver, that afterwards, and while the said sum of money in the said bill of exchange specified remained wholly unpaid, to wit, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and twenty-five, to wit, at London aforesaid, the said bill of exchange was presented and shown to the said persons to whom the same was directed as aforesaid for their acceptance thereof, according to the said usage and custom of merchants; and that the said last-mentioned persons then and there had sight of the said bill of exchange, and were then and there requested to accept the same; but that the said last-mentioned persons did not, nor would, at the said time when the said bill of exchange was so presented and shown to them for their acceptance thereof as aforesaid, or at any time before or afterwards, accept the same, or pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; nor did, nor would they then, or at any other time, accept or pay the said second, third, or fourth of exchange in the said bill of exchange mentioned, or any of them, but therein wholly failed, and made default; whereupon, the said bill of exchange, afterwards, on the thirtieth day of August, in the year last aforesaid, to wit, at London aforesaid, was duly protested for non-acceptance thereof, according to the said usage and custom of merchants. Of all which said premises, the said defendants afterwards, to wit, on the fifth day of September, in the year last aforesaid, at London aforesaid, had notice; and thereupon the said defendants afterwards, to wit, on the twelfth day of September, in the year last aforesaid, *at London aforesaid, in order to prevent the said bill of exchange from being sent back and returned to the said persons, by the style, firm, and description of Messrs. Le Roy, Bayard, & Co., did, under the said protest so made as aforesaid, accept the said bill of exchange under protest, for honour of the said persons, known by the name, style, and description of Messrs. Le Roy, Bayard, & Co., and undertake that the said bill of exchange would be paid for the account of the said last-mentioned persons, if regularly protested and refused

*The bill was in the following form—

[*36]

"No. 281. Exchange for £500. Stg. Charleston, 18th July, 1825.

"Sixty days after sight of this first of exchange, (second, third, and fourth unpaid), pay to Messrs. Le Roy, *Bayard, & Co., or order, in London, Five Hundred Pounds Stg., value received, and place to account as advised by— [*37]

JAMES BUTLER CLOUGH.

To Messrs. Crowder & Co., Liverpool.

*The bill was endorsed, "Pay Messrs. W. G. Mitchell & Co., of Glasgow, or order"— (Signed) "LE ROY, BAYARD, & Co." [*38]

and the acceptance was written across the bill in the following form:—

"Accepted under protest, for honour of Messrs. Le Roy, Bayard, & Co., and will be paid for their account, if regularly protested, and refused when due.

BARING, BROTHERS, & Co."

In addition to the foregoing facts, it was admitted, that the post from Liverpool to London is a two-day post, and that the bill was not presented for payment in London, or protested for non-payment in London, prior to its being presented for payment to the defendants on the 3d day of November, 1825; and that the drawees, Crowder, Clough & Co. had not, when the bill became due, any house of business in London.

*Scarlett, A. G., for the plaintiffs, argued, that the bill ought to have been presented for payment at the domicile of the drawees, as, in fact, it had been; and that, presenting it at the Royal Exchange, or at the market-cross of the town where it was payable, merely applied to cases in which the residence of the drawee is unknown. And he cited Scarlett on Exchanges, (a) Marius, (b) and Forbes' Inst. (c) [*39]

when due, and did subscribe the said acceptance on the said bill of exchange according to the usage and custom of merchants.* And the said plaintiffs further aver, that afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and twenty-five, to wit, at London aforesaid, the said bill of exchange, being still wholly unpaid, was shown and presented for payment to the said persons to whom the same was directed as aforesaid, according to the usage and custom of merchants; and the said last-mentioned persons were then and there requested to pay the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange; but that neither the said persons to whom the said bill of exchange was directed as aforesaid, nor any other person or persons on their behalf, did, or would, at the time when the said bill of exchange was so shown and presented for payment thereof as aforesaid, or at any time afterwards, pay the said sum of money therein specified, or any part thereof, but wholly refused and neglected so to do;† and thereupon the said bill of exchange was afterwards, to wit, on the same day and year last mentioned, at London aforesaid, duly protested for non-payment thereof, according to the usage and custom of merchants; of all which several premises the said defendants afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, had notice. By means whereof, and according to the said usage and custom of merchants, the said defendants then and there became liable to pay the said plaintiffs the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of their said acceptance thereof; and being so liable, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, afterwards undertook, and then and there faithfully promised the said plaintiffs, to pay them the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of the said defendants' said acceptance thereof."

The second count was similar to the first, except, that, instead of the words between the * * , the following were inserted, "at London aforesaid, did, under the said protest, so made as aforesaid, accept the said last-mentioned bill of exchange in writing, for honour of the said Messrs. Le Roy, Bayard, & Co., and subscribe the said acceptance on the said last-mentioned bill of exchange according to the usage and custom of merchants." And instead of the words between the † †, the following words were inserted:—"but the said persons to whom the said last-mentioned bill of exchange was directed as aforesaid, then and there wholly neglected and refused to pay the same."

The declaration also contained the money counts, and account stated, with the common breach. Plea—general issue.

N. B. It seems that the second count would, in this case, not have been by itself sufficient, as Lord TENNERDEN, C. J., held, that the acceptance on this bill was not an ordinary acceptance for honour.

(a) P. 160. "When he that is drawn upon dwells not in the same place where the bill is to be paid, yet the acceptor is obliged to bring his moneys to that place where the bill is to be paid." P. 166.—"The possessor of a bill is not obliged to protest against an out-dweller, (i. e. one who does not live at the place where the bill is payable), at his house or dwelling, nor

*40] *Gurney*, for the defendants. We contend, that a bill is to be protested for non-payment at the place where it is made payable, and that that is the constant practice; we therefore say, that this bill should have been protested for non-payment in London, on the 1st of November, the day on which it became payable. Bills of exchange are always to be construed with reference to the custom of merchants, and there is not a merchant in London who doubts the practice.

For the defence, several witnesses who resided in London were called, and they stated, that, in the case of a bill drawn on a merchant in Liverpool, payable in London, they should protest it for non-payment in London; and, if there was no particular place in London at which the bill was made payable, the holder should make a declaration to the notary, that the drawee had not given him notice where the bill would be taken up in London. One of the witnesses (Mr. Mellish) said, that, holding such a bill, he should not think himself bound to send it to Liverpool, although the drawee might live there. Several of the witnesses stated, that the present practice was not to go and present bills at the Royal Exchange, as that would be only going through an idle ceremony. It was also stated, that this acceptance was not in the common form of an acceptance for honour—that being “accepted for the honour of the drawer,” or “accepted for the honour of such an endorser.”

In reply, several witnesses from Liverpool were called, who stated, that, as to bills circumstanced like the present, of which a great number came to Liverpool, the universal practice in Liverpool was, to present them for payment at the counting house of the drawee, and protest them at Liverpool.

*41] *Scarlett*, A. G., in reply. The form of this acceptance *bound these parties to present this bill for payment to the drawees at Liverpool. The general rule is, that where the domicile of the drawees is known, the bill must be presented there; and, with respect to the custom, that, to be binding, must be universal; and here the evidence shows, that it is considered to be one way in London, and the contrary at Liverpool.

Lord TENTERDEN, C. J. (in summing up.) The question here is, whether, upon the terms of this acceptance, the holders were bound to protest this bill for non-payment at Liverpool or London. If there be no general usage on this point, the law must prevail, which is, that the bill must be protested for non-payment at the place where the drawee resides. The evidence for the defendant goes to show, that, if the holder was in London, it is not considered necessary to send the bill down to Liverpool to be presented. But that which we have to decide is, whether a presentment in Liverpool is not sufficient. The practice seems to be, that, if the holder lives in London, he does not present the bill for payment at Liverpool, and that, if he resides in Liverpool, he does. However, all this applies to cases where the acceptance is in the usual form;

to seek him out of the city or town where the payment is to be made.” The work from which this is cited, is entitled, “The Style of Exchanges, by John Scarlett.” It was published in 1684. It is a very scarce book, but will be found in the library of the British Museum.

(b) *Marius*, 106, 107.—Suppose a bill of exchange to be drawn from Rouen, and directed thus—To Mr. William P., merchant at Southampton; but be made payable thus—Pay this, my first bill of exchange, at the house of Mr. Roger C., in London, to the order of Mr. Benjamin L.; this bill must be sent to Southampton to be accepted; and if acceptance is refused, it may either be protested at Southampton for non-acceptance, or sent to London, and there be protested for non-acceptance. “But now, when this bill is due, you must then only endeavour to get payment at London, according to the express words and tenor of the bill; and if no order be given at the house of Mr. Roger C., in London, for payment, or if a particular house be not expressed, but only the bill is payable in London, if you have not your money brought you within the three days after the bill is due, you must cause protest for non-payment to be made in London, according to the usual manner.”

(c) 1 *Forbes*, Inst. 191.—Any third person may accept a bill *supra* protest, for honour of the drawer or endorser, after it hath been protested for non-acceptance against the person drawn upon. The acceptor has, beyond the day in the bill, three days allowed him to make payment, called days of grace, or favour, or respite days; upon the last of these days of grace, the creditor in the bill ought to protest it against the acceptor for non-payment. In all cases where bills are protested for non-acceptance or non-payment, advice thereof must be sent by the next post to the drawer and endorser.

but this form is rather singular, it being an acceptance under protest, for the honour of Le Roy, Bayard, & Co., to be "paid for their account, if regularly protested, and refused when due." Now, how can these words "refused when due," have any meaning, unless the bill is to be presented for payment at Liverpool? As a question of law, I am clearly of opinion, that this bill should be presented for payment, and protested for non-payment, at Liverpool; and that, without that, there is no meaning in the words "refused when due." However, as both parties treated it as a question of fact, I have left it to the Jury. How can it be said that the bill has been refused, if it has not been presented at the domicile of the drawee? Verdict for the plaintiffs.

*Scarlett, A. G., Chitty, and Tomlinson, for the plaintiffs.

Gurney, F. Pollock, and Dodd, for the defendants.

[42]

[Attorneys—Hurd & Johnson, and Lawson & Co.]

IN the ensuing Term, Gurney moved for a rule to show cause, why there should not be a new trial, on the ground, that the plaintiffs were not entitled to recover, as the bill had not been protested in London.

LORD TENTERDEN, C. J. The words of this acceptance are, "if regularly protested, and refused when due." I told the Jury that I could not understand how there could be a refusal, unless there was a personal demand. The effect of the evidence adduced on the part of the defendants was only this, that if the holder lives in London, he is not *bound* to send the bill to Liverpool to be presented.

BAYLEY, J. In the case of Williams v. Germaine, the judgment was arrested, because there was no allegation that the bill was presented to the drawee. From the language of this acceptance, it is clear, that *presentment* should be made; and then comes the question—where? I think at the drawee's residence. And it seems to me, that there must be a personal application, where no place of payment is given. If there was no acceptance given on a bill payable in London, it seems to me, that the proper place at which to present it would not be at the Royal Exchange, but at the residence of the drawee.

LITLEDALE, J. I am of the same opinion. Whether a presentment in London would have been sufficient or not, the more regular way, certainly, was to apply to the drawee.

*PARKE, J. The form of this acceptance is such as to make it unnecessary to inquire into the alleged custom. The meaning of the acceptance evidently was, "if regularly presented and refused;" and the word "protested" must have been put in by mistake. The meaning was, that the bill should be presented to the person on whom it was drawn, and refused by him. Rule refused.

In the case of Hoare v. Casenove, 16 East, 391, it was held, that the acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first endorers, are not liable on such acceptance, unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. So, in the case of Williams v. Germaine the elder, 1 M. & R. 394, it was held, that where a party accepted a bill for the honour of the drawer, on the refusal of the drawee, it must be presented again to the drawee for payment at maturity, before the acceptor for honour can be charged on his acceptance, even in the case of a bill payable after sight. And in the case of Germaine v. Williams the younger (who was the drawer of the same bill), Id. 403, it was held, that, to charge the drawer, it was necessary to show a presentment to the drawee at maturity; and that a presentment to the acceptor for honour was not sufficient.

In the cases of Selby v. Eden, 3 Bing. 611, and Fayle v. Bird, 6 B. & C. 531, it was held, that a bill drawn payable to "order in London," did not require presentment in London. See also Mr. Justice Bayley's Treatise on the Law of Bills of Exchange, p. 136—139.

On the subject of presentment, it is laid down in the Code de Commerce, liv. 1, tit. viii, s. xii, Art. 173, as follows:—"Les protêts faute d'acceptation ou de paiement sont faits par deux notaires ou par un notaire et deux témoins ou par un huissier et deux témoins. Le protêt doit être fait—Au domicile de celui sur qui la lettre de change était payable ou à son dernier domicile connu. Au domicile des personnes indiquées par la lettre de change pour la payer au besoin. Au domicile du tiers qui a accepté par intervention. Le tout par un seul et même acte. En cas de fausse indication de domicile le protêt est précédé d'un acte de perquisition."

44*] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER TRINITY TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

ROWNSON, Gent., One, &c., v. EARLE. Oct. 28.

If, in an action for an attorney's bill, it appear that the plaintiff in his bill charges for specific attendances on particular days; and, besides that, charges a further sum for several attendances—The Judge at the trial will direct the jury to deduct this latter sum from the amount of the bill.

ASSUMPSIT to recover the amount of an attorney's bill. Plea—General issue.

The business done was the defence of a suit in Chancery, which had been commenced against the present defendant.

In the plaintiff's bill of costs there were many specific charges for attendances on particular days; and, at the end of the bill, was a charge for "Several attendances, 1*l.* 1*s.* 0*d.*"

LORD TENTERDEN, C. J. With respect to the reasonableness of the charges in this bill, the defendant may object to them in taxation before the Master; but there is one item that the Jury ought to deduct, which is a charge of 1*l.* 1*s.* 0*d.* for several attendances. Now, although such a charge might be good, if there were no charges for specific attendances, yet, as in this bill there are several charges for specific attendances, the plaintiff is not at liberty to make a general charge besides.

Verdict for the plaintiff for the amount of the bill, after deducting 1*l.* 1*s.* 0*d.* *F. Pollock* and *Tomlinson* for the plaintiff.

The defendant in person.

[Attorneys—*E. Chester*, and *Willett & L.*]

45*]

*WOOD v. SMITH. Oct. 28.

The general rule is, that whatever a seller represents at the time of a sale is a warranty. A warranty may be either general or qualified. If a person, at the time of his selling a horse, say, "I never warrant, but he is sound as far as I know;" this is a qualified warranty, and the purchaser may maintain *assumpsit* upon it, if he can show that the horse was unsound to the knowledge of the seller.

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the plaintiff would buy a certain mare of the defendant, the defendant undertook and faithfully promised, "that the said mare was sound to the best of his knowledge." And the plaintiff averred, that, confiding, &c., he bought the mare at the price of 25*l.*; and that the defendant did not, nor would regard his said promise, but subtilely contriving, &c., deceived the plaintiff in this, that the said mare was not sound, but, on the contrary thereof, was unsound, as the defendant then well knew. There were other special counts, and the money counts. Plea—General issue.

It was proved, that, at the time of the sale of the mare, the plaintiff said to the defendant, "She is sound of course?" To which the latter replied, "Yes, to the best of my knowledge." And on the plaintiff saying, "Will you warrant her?" the defendant said, "I never warrant, I would not even warrant myself." Evidence was also given, that the mare was unsound, and that the defendant knew it.

Gurney, for the defendant, objected that the declaration should have been in *tort* and not in contract, as there was an express refusal to warrant.

Lord TENTERDEN, C. J. I think that this declaration is sufficient; there is a count on a promise, that the mare was sound to the best of the defendant's knowledge, with a breach, that he knew her to be unsound. Now, if a man says, when he sells a mare, "she is sound to the best of my knowledge, but I will not warrant her," and it turns out that the mare was unsound, and that he knew it, I have no doubt that he is answerable.

Verdict for the plaintiff, with leave to move to enter a nonsuit.

*Scarlett, A. G., and Curwood, for the plaintiff.

Gurney, and Thesiger, for the defendant.

[*46]

[Attorneys—Hinrich, and Adlington & Co.]

In the ensuing Term, *Gurney* moved, in pursuance of the leave given, contending that the action should have been in *deceit*, and not in *assumpsit*, because there was an express refusal to warrant. He cited *Williamson v. Allison*, 2 East, 446, and *Dobell v. Stevens*, 5 D. & R. 490.

BAYLEY, J. The general rule is, that whatever a person represents at the time of a sale, is a warranty. But the party may give either a general warranty, or he may qualify that warranty. By a general warranty, the person warrants at all events; but here the defendant gives a qualified warranty, as he only warrants the mare sound for all he knows.

PARKE, J. I have very frequently seen such counts as this.

Rule refused.

REX v. WHITE. Oct. 28.

A. placed valuable securities in the hands of B., with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." No accident did happen to A., and the proceeds were by B. converted to his own use:—Held, that B. was not indictable under the stat. 52 Geo. 3, c. 63, (now repealed); and it seems that he would not be so under the stat. 7 & 8 Geo. 4, c. 29, s. 49.

An allegation in an indictment, that A. placed valuable securities in the hands of B., "with an order in writing to invest the proceeds in the government funds," is not supported by proof of an order in writing, directing B. to invest the proceeds in the government funds, in case of any unexpected accident happening to A.

INDICTMENT on the stat. 52 Geo. 3, c. 63. The *first* count was as follows:—"The Jurors, &c., present, *that on, &c., at, &c., one Anne Hubert, widow, [*47] did deposit with, and place in the hands of one Matthew White, as her agent, two exchequer bills, for the payment and of the value of 500*l.* each, and two bank notes, for the payment and of the value of 100*l.* each, the property of the said A. H., with an order in writing, signed by the said A. H., for the said M. W. to invest the sums of money to which the said exchequer bills and bank notes related, in the purchase of Government funds. And the Jurors, &c., do further present, that the said M. W., late of, &c., broker, the agent in whose hands the said exchequer bills and bank notes were so deposited and placed by the said A. H., with such order in writing, signed by the said A. H., to invest the sums to which the said exchequer bills and bank notes related, in the purchase of Government funds, afterwards, to wit, on the same day and in the year aforesaid, at, &c., unlawfully did apply to his own use and benefit the said exchequer bills and bank notes, and the sums of money the same bills and notes related to, in violation of good faith, and contrary to the special purpose specified in the order in writing beforementioned, with intent to defraud the said said A. H., the owner of the said exchequer bills and bank notes," against the form of the statute, and against the peace. The *second* count stated, that the said M. W. afterwards, to wit, on, &c., at, &c., being a person with whom, as the agent of the said A. H., certain securities for money, that is to say (two exche-

quer bills and two bank notes, described as before), the property of the said A. H., were then and there deposited and placed, with an order in writing, signed by the said A. H., to invest the said sums of money to which the said exchequer bills and bank notes related, in the purchase of Government securities, unlawfully did apply to his own use and benefit the said exchequer bills and bank notes, in violation of good faith, and contrary to the special purpose specified in the

*48] order in writing last mentioned, with intent to defraud the said A. H., *against the statute, and against the peace. Plea—Not guilty.

The case opened on the part of the prosecution was, that Mrs. Hubert, on her going abroad in the year 1821, sent two exchequer bills, for 500*l.* each, and two bank notes of 100*l.* each, with a written direction as to the investment of the proceeds; that, on her return to this kingdom, she discovered that the defendant had applied the proceeds to his own use; and that he had subsequently given her his bond for the amount. But it was argued, that the prosecutor's accepting that bond would be no answer to this indictment.

Mrs. Hubert was called; she stated that she had sent the exchequer bills and bank notes to the defendant on the 8d of September, 1821, with a letter, which was produced: (a) It was in the following terms:—

“September 8d, 1821.

“Being about to quit England for a month or six weeks, I beg leave to place in your hands two exchequer bills for 500*l.* each, making, together with the sum of 200*l.*, a sum of 1200*l.*, and some interest, for the purpose and with the intent of your investing it or the proceeds, *in case of any unexpected accident*, in the Government funds, *at a time when you shall judge it desirable to buy in*, in trust for the benefit of my son William Arthur Hubert, now a minor; and my will and desire is, in case of my death, that the money should be placed in the joint names of yourself and our friend, Mr. James Wingfield, of Great Marlborough Street, solicitor, and of my said son; applying the interest to his education, and the principal to be paid to him on his coming of age; and in conclusion, I request your kindness and good offices to him.”

*49] Lord TENTERDEN, C. J. This direction in writing *does not sustain the allegation in the indictment, for the allegation is, that the defendant was directed to invest, absolutely and unconditionally; and the direction proved is only, to invest, in case of any accident happening to Mrs. Hubert. Now, no accident has happened; and, under these circumstances, the defendant cannot be liable to punishment for not investing. The defendant must be acquitted.

Verdict—Not guilty.

Brougham, and *Thesiger*, for the prosecution.

Denman, for the defendant.

[Attorneys—*Hubert*, and *Fawcett*.]

(a) The defendant produced this under a notice to produce.

See the case of *Rex v. Prince*, 2 C. & P. 517. We are informed that the case of *Rex v. Prince* was acted upon by the Court of King's Bench, in Ireland, in the case of *Father Murphy*.

The stat. 52 Geo. 3, c. 63, is wholly repealed by the stat. 7 & 8 Geo. 4, c. 27; but by the stat. 7 & 8 Geo. 4, c. 29, s. 49, it is, ‘for the punishment of embezzlement committed by agents intrusted with property,’ enacted, “That if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object

or purpose for which such *chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own [*50 use or benefit, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned."

By sect. 50 of the same statute it is provided and enacted, "That nothing hereinbefore contained relating to agents shall affect any trustee in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand."

And by sect. 52 of the same statute it is provided and enacted, "That nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any Court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt."

*FROWD, Gent., v. STILLARD. Nov. 2.

[*51]

An attorney may recover the amount of his bill in an action, although the copy delivered under the statutes 2 Geo. 2, c. 23, and 12 Geo. 2, c. 13, contain such abbreviations as— "Declon," "Instrons," "Confce," "Afft," "Attg," &c.

ASSUMPSIT on an attorney's bill. The copy of the bill delivered to the defendant contained the following abbreviations:—

Drawg. Declon. ffo. 15.

Instrons. for Case.

Attg. you in long confce.

Preparing Afft.

Cockburn, for the defendant, submitted that the plaintiff must be nonsuited, because he had not delivered his bill in a proper state, under the statutes 2 Geo. 2, c. 23, and 12 Geo. 2, c. 13.

Scarlett, A. G., for the plaintiff. In a case of *Reynolds v. Caswell*, 4 Taunt. 193, the following abbreviations occurred, viz. "Instrons. for declaration, ffo. 18."—"Pd."—"2 fair copies," "Serjt." "Atty." "Lres." &c.; and the Court said, that they were abbreviations common and intelligible to every professional man, and held, that the plaintiff was entitled to recover.

Lord TENTERDEN, C. J. I am entirely of that opinion in the present case. I think that the object of the legislature is, that a client shall have his bill delivered to him in such language as he can understand; and I think no man living can doubt as to the meaning of these abbreviations.

Verdict for the plaintiff.

Scarlett, A. G., and *Wyborn*, for the plaintiff.

Cockburn, for the defendant.

[Attorneys—*Frowd*, and *Willet & L.*]

*By the stat. 2 G. 2, c. 23, s. 23, it is enacted, that "No attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements [*52 until the expiration of one month after he shall have delivered a bill of such fees, charges,

disbursements, written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and sums, which bill shall be subscribed with the proper hand of such attorney or solicitor respectively." But by the stat. 12 Geo. 2, c. 13, s. 5, it is enacted "that it shall and may be lawful to and for every attorney, clerk in court, and solicitor, to write his bill of fees, charges, and disbursements, with such abbreviations as are now commonly used in the English language."

LEWIS and Another v. MARLING. Nov. 3

A party took out a patent for an improved shearing machine, to shear woollen cloths, and claimed four things as his invention: one of them was, a proper substance to brush the cloth. In describing the machine in the specification, he directed plush to be used for this purpose, but he nowhere stated, that this was an essential part of his machine. Before the time of this party's invention, some kind of brush had been uniformly used, but it was subsequently ascertained, that, with this machine, no brush was necessary:—Held, that this did not invalidate the patent.

Before a party took out a patent for a machine, a model of a similar machine was made, unknown to him, and a machine was begun to be made from it, but no similar machine was ever used in this country, before the patent:—Held, that this was not sufficient to defeat the patent.

CASE for the infringement of a patent, for an improved machine for shearing woollen cloths. Plea—General issue.

This was the same patent which was the subject of discussion in the case of *Lewis v. Davis*, 3 C. & P. 502, and

Scarlett, A. G., for the plaintiff, contended, that the Jury ought to give considerable damages, as the validity of this patent had been litigated in that case.

The two specifications, dated in the years 1815 and 1818, mentioned, 3 C. & P. 503, were read.

In the second specification, dated 14th July, 1818, the plaintiffs claimed, as their invention, four things, as stated, 3 C. & P. 503: one of which was, "a proper substance to brush the cloth," and this was described in the specification as follows:—"A narrow strip of plush is fixed on the surface of the cylinder, *53] parallel with the wire, *to answer the purpose of a brush for raising up the wool, which is to be shorn off the cloth; or, instead of the plush, bristles may be inserted on the cylinder."

Evidence was given of the novelty of the invention, and of the defendant's infringement of the patent.

A witness stated, that, previous to the use of the plaintiffs' machine, some substance had been always used to raise up the wool to be shorn, but that it was found, that, in the plaintiffs' machines, it was unnecessary, if more than one cutter at a time was used on the cylinder; and that, in point of fact, this plush never was used. He also stated, that the plaintiffs had only made one machine which had it; and that, out of one thousand and more of their machines that they had sold, none of them had any plush or any other substance to raise the wool.

F. Pollock, for the defendant. I submit that the plaintiffs must be non-suited. The plaintiffs claim this plush as a part of their invention, and its application is minutely described in the specification. Now, the witness says, that the plaintiffs never even sold a single machine that had this plush applied to it; and I apprehend, that where a patent is taken out for a machine, consisting of several parts, and one of them is wholly useless, the patent is void. It may be said, that it is a hardship that the party should be obliged to make a specification before he has completed his invention; but, to do that, time is always given. I admit, that, if a machine is described in general, it would be no objection that some particular part might be made better, but here this plush is claimed as a specific invention.

Scarlett, A. G., for the plaintiffs. The argument on the other side is, that if a man makes an improved machine, combining with it something that was

always thought necessary, and it be afterwards found that his improvement is a good, that it dispenses with this thing that was *always thought necessary, he is to lose his patent. The public is not deceived, and the only [*54 objection now is, that it was found, a year after the taking out of the patent, that if more than one cutter were applied, the plush was unnecessary.

Brougham, on the same side. We say, that one of our novelties is the using of a brush of plush upon the cylinder, and that is an improvement upon the older modes of brushing; in the same way we say, that our rotary cutters are an improvement on shears used by hand.

F. Pollock, in reply. If the thing was beneficial at the time of the invention, I admit that it will not vitiate the patent, that it becomes of no use by means of something invented afterwards; but here, the patentee claims, as an invention, a thing, that, with his machine, is useless.

Lord TENTERDEN, C. J. This is a patent for an improved machine for shearing woollen cloths, which is to be effected, by means of rotary cutters going from list to list. In his specification the plaintiff claims several things as of his invention, one of them being the application of a proper substance to brush the cloth. It appears, that, before this patent, the universal practice was, to raise the wool by means of some kind of brush: here, the patentee claims the exclusive use of this plush for that purpose, but not as an essential part of his machine. He claims it as his invention, and states it to be a novel mode of doing that which was always done before, either by a brush or by some other means. There was a case of a chemical compound, where the party mentioned in his specification some ingredient that he did not use; and the patent was held to be void; (a) but there the party deceived the Crown: and I think that that case is quite distinguishable from the present. Here the party says, this is a part of my *machine, but he nowhere says, that it is essential. I think, there- [*55 fore, that there is no weight in the objection.

The defence was, that the mode of shearing from list to list by means of rotary cutters was not new at the time of the plaintiffs' patent; and it was proved, that, in the year 1811, a specification was enrolled in America, for a machine to shear cloth from list to list by means of rotary cutters; and that, in that year, a model of an exactly similar machine was brought to England, and exhibited to three or four persons. It was also proved, that, in the year 1811, Mr. Thompson, a manufacturer in Yorkshire, employed workmen to make a machine from the American specification, and that they had set about it, but that, in consequence of the Luddite riots, Mr. Thompson was afraid to have it completed. However, in answer to this, it was shown, that, after the riots had ceased, the machine was left unfinished, and Mr. Thompson bought the plaintiffs' machines.

Lord TENTERDEN, C. J. The object of the plaintiffs' patent is, a method of shearing from list to list by means of rotary cutters; and if the case rested on the evidence on the part of the plaintiffs, there is no doubt that the plaintiffs' was the first machine of this kind used in this country; but, on the part of the defendant, it is contended, that there is such a want of originality and novelty in the plaintiffs' machine, as will prevent their recovering in this action. It is no doubt incumbent on the plaintiffs to show that their machine is new, but it is not necessary that they should have invented it from their own heads; it is sufficient that it should be new as to the general use and public exercise in this kingdom. If it were shown, that the plaintiffs had borrowed from some one else, then, of course, their patent would fail. To show that the machine was not new, evidence is given that a model has been seen by three or four persons, and that the making of a similar machine was begun; but it appears to me, that the defendant has *failed to prove that such a machine was generally [*56 known or generally used in England, before the taking out of this patent by the plaintiffs.

Verdict for the plaintiffs.—Damages, 200*l*.

Scarlett, A. G., Brougham, Campbell, and Rotch, for the plaintiffs.

F. Pollock, C. F. Williams, Alderson, and Godson, for the defendant.

[Attorneys—*Adlington & Co.*, and *Shearman.*]

IN the ensuing Term, *F. Pollock* moved for a rule to show cause why there should not be a new trial:—*First*, on the ground that the patent was void, as the plush was unnecessary. *Secondly*, that the shearing the cloth from list to list, by means of rotary cutters, was not new. And *thirdly*, on affidavits, that some further evidence had been discovered since the trial. He cited *Crompton v. Ibbotson*, 1 D. & L. 83, *Turner v. Winter*, 1 T R. 602, *Rex v. Arkwright*, (a) *Forsyth v. Riviere*, *Godson on Patents*, p. 55.

LORD TENTERDEN, C. J. I think that we ought not to grant any rule. As to the objection to the specification respecting the plush, it is not anywhere alleged that the plush is essential; and we find, that, before this patent was granted, a brush had been used. When the plaintiffs were applying for a patent, they had made a machine, and had put plush on it; but, before they made any of the machines for sale, they had discovered that it was useless. If the plush had been mentioned as an essential part of the machine, and it had not been useful or necessary, the patent could not have been supported. With respect to *57] the other point, it appeared that a model had been *made, but still that model was not a machine; and we find that the possessor of it has bought these machines since; and that he never completed his machine according to the American specification. It therefore appears, that, till the invention of the plaintiffs came out, there was not used and exercised in England any machine that would cut from list to list by rotary cutters. If these plaintiffs had seen this model, or had known of it, the case would have been different; but, the question is, whether, at the time of the patent, this machine was now as to the public use in England.

BAYLEY, J. I think there should be no rule.—However, our refusing a rule will not hinder the defendant from applying for a repeal of the patent, if he should be so advised. To support a patent, it is necessary that the specification should make a full disclosure to the public. If the patentee suppresses anything, or if he misleads, or if he does not communicate all he knows, his specification is bad. So, if he says that there are many modes of doing a thing, when in fact one only will do, this will also avoid his patent; but, if he makes a full and fair communication, as far as his knowledge at the time extends, he has done all that is required. Mr. *Pollock* objects to that part of the specification which respects the use of the plush. Now, at the period when this specification was made, the plush was in use, and there is no reason to believe that this patentee did not think it was a useful part of the machine. His patent is for an instrument where something of that kind was always thought material; and I am of opinion, that the subsequent discovery, that the plush was unnecessary, is no objection to the validity of the patent. If the party knew that it was unnecessary, the patent would be bad, on the ground that this was a deception; but if he thought it was proper, and only by a subsequent discovery finds out that it is not necessary, I think that it forms no ground of objection. An- *58] other ground of objection is this: it is said that communications were made *from America; if it had been shown that the plaintiff had seen the model, and had borrowed from it, he would not have been the true inventor, and would therefore have misled the Crown; but, if I make a discovery, and am enabled to produce an effect from my own experiments, judgment, and skill, it is no objection that some one else has made a similar discovery by his mind, unless it has become public. So, if I introduce a discovery, *bonâ fide* made, I may have a patent for it, though a person might have received privately a communication from abroad, which would have enabled him to have made the ma-

(a) This case is published in a separate form, and is cited in Mr. Godson's work on patents.

chine. As to the affidavits, I do not think them sufficient to justify the Court in granting a rule.

PARKE, J. I am of the same opinion. The first objection is, that this patent is for several things, and that one of them, though considered to be useful at the time, has since turned out to be useless. There is no case that decides, that if a patent be taken out for several things, and one of them turns out to be useless, the patent is therefore bad; though there are cases that decide that it is bad, if one of the several things be not new. The stat. 21 Jac. 1, c. 3, s. 6, makes it necessary that the invention should be new, but it does not require that it should be useful. The Crown has here granted a patent for fourteen years, upon certain conditions, and those conditions have been complied with. By the statute the Crown has power to grant patents to the true inventor and inventors of any manner of new manufactures within the realm, "which others, at the time of making such letters patent and grants, shall not use," so as they be not contrary to law, &c. There was no proof at the trial of the use of this invention in England before the date of the plaintiffs' patent; and there is no case where the patent has failed, unless the thing had been actually used; and no case requires that the invention should be useful in all its parts.

Rule refused.

*COURT OF COMMON PLEAS.

[*59]

SITTING AT WESTMINSTER, AFTER TRINITY TERM, 1829.

BEFORE LORD CHIEF JUSTICE TINDAL.

NEWBERY v. ARMSTRONG. July 9.

An agreement in the following form:—"I bind myself to be security to you, for J. C., late in the employ of J. P. of L. W., for whatever you may intrust him with, while in your employ, to the amount of 50*l*." contains a sufficient consideration on the face of it.

ASSUMPSIT on the following agreement:—

"To Mr. John Newbery,

"Sir,—I, the undersigned, do hereby agree to bind myself to be security to you for J. Cochrane, late in the employ of J. Pearson, of London-wall, for whatever you may intrust him with, while in your employ, to the amount of 50*l*., in case of any default to make the same good.

W. ARMSTRONG.

"11th March, 1828."

Witnesses were called for the plaintiff, who proved the payment of various small sums of money to Cochrane, on account of the plaintiff; and it was also proved that Cochrane had not paid them over.

Taddy, Serjt., for the defendant, submitted, on the authority of *Wain v. Warlters*, 5 East, 10, and *Saunders v. Wakefield*, 4 B. & A. 595, that the agreement could not be made available, because there was no mutuality and no consideration appearing on the face of it. In a late case of *Lees v. Whitcomb*, 5 Bing. 34, 2 M. & P. 86, and 3 C. & P. 289, which was on an agreement to remain with a person for two years to learn the business of a dress-maker; the agreement was held to be void, because there was no mutuality, for the want of an agreement to teach. And, in *the present case, there is no statement that the plaintiff had agreed to take Cochrane into his service, on account [*60 of the defendant's agreeing to be his surety. There is nothing appearing on the face of the agreement, by which the plaintiff could be compelled to take Cochrane into his employ, or on which any action could be maintained against him for refusing to do so.

TINDAL, C. J. I think that you lay your rule rather too widely, when you say, that there must be mutuality. There must be a *consideration*. And if, by fair inference, we can find it, that will be sufficient. It seems that Cochrane had been in the employ of another person, as the agreement says, "late in the employ of J. Pearson, of London-wall." It then goes on to say, that the defendant will be security for him *while he is in the employ of the plaintiff*. And I think, in all these cases, it is enough if it can be shown by fair inference, that there was a consideration—if we can, as it were, spell it out from the agreement. With respect to the case of *Lees v. Whitcomb*, it seems that there the agreement was to *remain*, which makes a difference. I think the plaintiff is entitled to the verdict. Verdict for the plaintiff.—34l.

Wilde, Serjt., and *Kelly*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attorneys—*Davies*, and *Sutcliffe & B.*]

In the ensuing Michaelmas Term, *Taddy*, Serjt., moved to set aside the verdict, but the Court Refused a rule.

Vide *Jenkin v. Reynolds*, 6 B. Moore, 86; and 3 Brod. & Bing. 14; *Stadt v. Lill*, 9 East, 348; and 1 Camp. 242; and *Warrington v. Furber*, 6 Esp. 89.

*61] *ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1829.

BEFORE LORD CHIEF JUSTICE TINDAL.

FIELDER v. RAY. July 20.

The plaintiff may recover on proof of work done, on an implied contract, although it appear in the course of the defendant's case, that there was a written agreement relating to the matter, but which cannot be read for the want of a stamp. *Scus*, if the fact come out in the course of the plaintiff's case.

ASSUMPSIT for work and labour, money paid, &c.

The action was brought to recover charges for printing calico. On the part of the plaintiff, the performance of the work was proved. The defendant admitted that, for a part of it, he was liable to the plaintiff, and had paid a certain sum of money into Court. With respect to the other part, he contended that he was not liable to the plaintiff, but to a person named Aldridge. It appeared, that, in the month of September 1827, the defendant had in his hands a dishonoured bill of Aldridge's, who was a calico printer, carrying on business at Wandsworth; and, for the purpose of getting it paid, he made a verbal contract with the person who managed Aldridge's concern, that Aldridge should print, on particular terms, certain quantities of linen. The first delivery took place in December 1827. In the beginning of January 1828, the defendant was informed, that Aldridge had parted with his business to the plaintiff Fielder; but he said to the person who informed him, that he should look to Aldridge for the completion of the work. Further deliveries were made in the months of January and February, 1828. On the 12th March, 1828, the defendant refused to send any more goods to be printed at the plaintiff's factory, unless the plaintiff would agree to deliver all that had been sent already, without prejudice to his (the defendant's) claim upon Aldridge. Accordingly, the plaintiff's manager, on the following day, brought a paper to the defendant, *which it was suggested was an agreement containing these terms. This paper was produced

by *Wilde*, Serjt., on the part of the defendant, and was objected to by *Taddy*, Serjt., for the plaintiff, it not having any stamp. It was suggested, that it was within the exception in the stamp-act, as relating to goods. But, upon this point, *Taddy*, Serjt., referred to *Buxton v. Bedale*, 3 East, 303, which decides, that a contract, relating not to the *sale*, but the *making* of goods, is not within the exception, and must have a stamp.

Wilde, Serjt., then called a witness, who stated that the paper was in existence on the 13th of March, and that it was the agreement under which the work was performed. He then submitted, that the plaintiff could not recover upon the *quantum meruit* counts, upon an implied contract; because it appeared that the terms upon which the business was done, were reduced into writing; and the writing could not be given in evidence, because it wanted a stamp; and therefore the plaintiff failed in making out any case, and must, of course, be non-suited.

TINDAL, C. J., was of opinion, that the agreement required a stamp, as not being within the exception, which was confined to agreements relating to the *sale* of goods; and, with respect to the other point, his Lordship decided, that the case should go to the Jury upon the parol testimony, taking a note of the objection with a view to ulterior proceedings in the Court above.

It appeared further in evidence, that the plaintiff had made certain payments to the Excise, in respect of the goods; and that the change in the proprietorship of the concern had been generally notified by circular letters, *which were dated on the 1st January, 1828, but not delivered till the middle of [†63 that month.

Wilde, Serjt., for the defendant, in his address to the Jury, submitted, that if the plaintiff Fielder had not intended to carry on the business for Aldridge, as far as the defendant was concerned, he should have objected to proceed any further with the work, until some contract had been made between him and the defendant; and that, as he had not done so, he must be taken to have carried on the business upon the terms of the previous contract made between the defendant and Aldridge.

Taddy, Serjt., in his reply, contended, that if the understanding had been such as the defendant stated it to be, the plaintiff would not have made the payments to the Excise. As to the payment into Court, that was made generally, and the plaintiff had a right to apply it to what part of his demand he pleased; and, applying it to the demand for the work and labour, he would be clearly entitled to recover the amount of the payment made to the Excise.

TINDAL, C. J., (in his summing up) said—The main question which you have to consider is, whether the plaintiff is entitled to recover for the printing of goods, and payments in respect of them, prior to the month of March. This will depend upon whether the parties contracted that the work should be done on the credit of Ray as between him and Fielder, or whether it was to go on as against Aldridge, so as to give Ray the right of set-off, which he would clearly have had if the business had been continued to be carried on by Aldridge. The question will be, whether the understanding was, that Fielder, as it were, should represent Aldridge, or that it should be altogether a new transaction. If you think that the work was done upon a new contract, issuing out of and bottomed *upon the circular, then there will be no right to set off the debt of Aldridge, [†64 and the plaintiff will be entitled to the verdict; but if you should be of the contrary opinion, then, as the amount of the money which has been paid into Court covers the claim with respect to the subsequent part of the transaction, you will find your verdict for the defendant.

Verdict for the plaintiff.

Taddy, Serjt., and *Moody*, for the plaintiff.

Wilde, Serjt., and *Helps*, for the defendant.

[Attorneys—*E. Isaacs*, and *Towers*.]

In the ensuing Michaelmas Term, *Wilde*, Serjt., obtained a rule *nisi*, for a nonsuit, which was discharged after argument, in the course of the same Term : vide 6 Bing. 332. But the Court granted a new trial, upon payment of costs ; in order that the defendant might have an opportunity of producing the agreement properly stamped. See the cases of *Doe v. Morris*, 12 East, 237, *Stephens v. Pinney*, 8 Taunt. 827, *Strother v. Barr*, 5 Bing. 144, and 2 Moore & Payne, 207, *Reed v. Deere*, 7 B. & C. 266, *Rex v. Inhabitants of Rawden*, 8 B. & C. 708, *Damer v. Langton*, 1 C. & P. 168, and *Vincent v. Cole*, 3 C. & P. 481

*65]

*SALISBURY v. MARSHAL. July 20.

Where the agreement under which a party holds a house states, that he "agrees to become tenant by occupying," it will be an answer to a claim of rent, in an action for use and occupation, if he shows that the house was not in such a reasonable and decent state of repair, as to be fit for comfortable occupation.

Use and occupation. The plaintiff claimed three quarters' rent. The tenancy was under the following agreement :—

"*Memorandum*.—John Marshal agrees to become a tenant of Richard Salisbury, by occupying a house, No. 47, in Nelson Square, Blackfriar's Road, of which he has an unexpired lease of two years, from March 22d last, for the whole of that period. The fixtures to be valued on coming in and going out, and the deterioration to be paid to the landlord by John Marshal, at his quitting the premises ; and as a security for the same, he has paid to Richard Salisbury 31*l.* 10*s.*, half-year's rent in advance. The rent to commence at Midsummer, 1827. But in case he should continue to hold, to be allowed to purchase the fixtures at the valuation set upon them at the time of taking possession.

"April 19th, 1828."

There was an understanding between the parties, that the premises should be put into proper repair. And it appeared that the plaintiff had done some repairs about the time the defendant went into possession ; but several witnesses proved, that, notwithstanding this, the house was not in such a state as that it could be occupied with any degree of comfort, partly from the admission of water through the roof and ceilings in wet weather, partly from the state of the water closet, the cistern, &c.

Wilde, Serjt., for the defendant, contended, that, under these circumstances, the defendant was not liable to pay the rent. He cited *Edwards v. Hetherington*. (a)

*66] **Taddy*, Serjt., for the plaintiff. This is no defence in law, the defendant expressly undertakes to pay rent, and if the house is untenable, that must be made the subject of a cross action. Even if there were an express covenant to keep the house in repair, it would not do, as there is an express undertaking to pay rent.

TINDAL, C. J. The words of this agreement are very singular ; the defendant is to become tenant by occupying. The question which I shall leave to the Jury will be, whether this was merely colourable repair, or that state of repair which was fit for convenient occupation. I have been for some time looking at the agreement, and anticipating the objection as it presented itself to my mind, and I think the difficulty is got rid of by the words "agrees to become tenant by occupying."

Taddy, Serjt., then addressed the Jury, in reply.

(a) R. & M. 368. That case decides, that "a tenant of a house from year to year, not under any agreement to repair, may quit, without previous notice to his landlord, on the premises becoming unsafe and useless, from want of repairs ; and such tenant is not liable in an action for use and occupation, for any rent after the occupation has ceased to be beneficial."

TINDAL, C. J., in summing up, said,—The question between the parties is as to the rent which became due for the three quarters of a year, from Michaelmas, 1828, to Midsummer, 1829, whether that rent is due to the plaintiff, or not. Worded as this agreement is, I think that the determination of this question will depend upon another, viz. whether the premises were put into such a reasonable and decent state of repair, as that a decent family might be supposed capable of occupying them during that time. It is not every little inconvenience which will justify the refusal to pay rent; but the question is, whether such repairs had been done at the time when the defendant was to go in, as that they could be reasonably expected to continue during the tenancy, and give the tenant the *decent enjoyment of the premises. I agree with the plaintiff's counsel, that if there had been a separate agreement to do these [*67] repairs, then the not having done them would furnish no defence. But I think that here it forms a kind of condition precedent, and the defendant was not compellable to enter until the house was put into such a state that a family of such condition could be reasonably expected to occupy it. With respect to the stipulation about paying rent in advance, it seems to me to apply to the first half year's rent only, which was to be paid instead of a sum of money. His Lordship then left the case to the Jury, who found a

Verdict for the defendant.

Taddy, Serjt., and *R. V. Richards*, for the plaintiff.

Wilde, Serjt., and *Patteson*, for the defendant.

[Attorneys—*Baxendale & Co.*, and *Vincent*.]

In the ensuing term, *Taddy*, Serjt., moved to set aside the verdict, but, at the suggestion of one of their Lordships, the parties compromised the matter. No opinion was expressed by the Court contrary to the ruling of the Lord Chief Justice at the trial.

DELAFIELD, Assignee of JONES, an Insolvent Debtor, v. FREEMAN and Another, Gents. Sept. 20.

An insolvent debtor is not a competent witness for the plaintiff, in an action brought by his assignee, because his future property is liable to the payment of the debts in his schedule, and therefore he is interested in procuring the recovery of as much money as possible.

CASE against attorneys for negligence in the preparation of a lease.

The insolvent was called as a witness for the plaintiff. His discharge was put in, and a release of his surplus.

* *Wilde*, Serjt., objected. He is not a witness. The discharge is only [*68] of the person, and keeps all the debts afloat, as debts which he is liable to pay out of his future property. An insolvent is not allowed to be bail, on the ground that his future property is liable. The 57th section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, enacts, "That before any adjudication shall be made in the matter of the petition of any prisoner, the Court or Commissioner, &c., shall require such prisoner to execute a warrant of attorney, to authorise the entering up of a judgment against such prisoner, in some one of the superior Courts at Westminster, in the name of the assignee or assignees, or of the provisional assignee, &c., for the amount of the debts stated in the schedule, to be due or claimed to be due, from such prisoner, or so much thereof as shall appear, at the time of executing such warrant of attorney, to be due and unsatisfied; and the order of the said Court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment shall have the force of a recognisance; and if at any time it shall appear to the satisfaction of the said Court, that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for

that purpose, the said Court may permit execution to be taken out upon such judgment, for such sum of money as, under all the circumstances of the case, the said Court shall order; such sum to be distributed rateably among the creditors, &c., and such further proceedings shall and may be had upon such judgment, as may seem fit to the discretion of the said Court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained, shall be fully paid and satisfied." From this it appears, that the insolvent is not discharged from his debts; he has, therefore, the most direct interest that his assignee shall recover as much property as possible, because he is not free till they are all discharged. The judgment

*69] *operates on his future property. The recovery here will pay debts which otherwise must be paid out of his future effects. The release of the surplus amounts to nothing, because we are not looking at something which he has to receive, but at something which he will have to pay.

Taddy, Serjt., in support of the witness. It is only a contingent interest which may arise, not any present interest; and such an interest is not sufficient to exclude his testimony.

Comyn, on the same side. By the act of Parliament, the insolvent is relieved from all actions, and the property is under the direction of the Court.

TINDAL, C. J., was of opinion that the witness was not admissible.(a)

The case proceeded, and there was a nonsuit, on the ground that the petition of the insolvent, being that which gave the Court its jurisdiction, ought to be produced, and was not. This nonsuit proceeded upon the 76th section of the act of Parliament; but it was afterwards set aside by the Court, and a new trial granted, on the ground, that, by the 19th section, an authenticated copy of the assignment was all that was required to prove the right of the assignee to sue. The Court refused to grant the rule for a new trial on the point as to the competency of the insolvent to be a witness.

Taddy and *Andrews*, Serjts., *Comyn*, and *Currie*, for the plaintiff.

Wilde and *Jones*, Serjts., for the defendant.

[Attorneys—*A. R. Cocker*, and *In Person*.]

(a) *Vide* the case of *Rudge v. Fergusson*, 1 Carr. & P. 253, in which the same question arose, and was decided in the same manner by Mr. Justice Littledale.

*70] *PERRING and Another *v.* TUCKER and Another. Oct. 26.

Where two defendants appear, and plead by one attorney, but, at the trial, counsel appear only for one defendant, and the other defendant appears in person, the counsel only will be allowed to address the Jury, but the defendant, who has no counsel, may cross-examine the witnesses.

TROVER for a mortgage deed. The defendants were Dr. Tucker and a Mr. Smyrdon, they had appeared and pleaded by one attorney.

At the trial, *Taddy*, Serjt., and *Chitty*, appeared for Smyrdon, and Dr. Tucker appeared to conduct his defence in person.

Upon this being stated to be the case by *Taddy*, Serjt., when he rose to cross-examine the first witness for the plaintiff—

Wilde, Serjt., objected to the arrangement, and the question was then discussed.

Chitty. A man may appear by attorney, and afterwards defend in person; his means may diminish: and if he were not in such case allowed to defend himself, he would not be able to make any defence at all.

TINDAL, C. J., inquired if there was any authority on the subject.

Wilde, Serjt., replied in the affirmative.

Taddy, Serjt. There is no case where the party himself has required it. The Court may make rules with respect to Counsel, who are, in a certain sense,

officers of the Court, but a defendant is in a different situation. If there were no Counsel and several defendants, all of them would be allowed to speak, although they had appeared by the same attorney.

Dr. Tucker said—That his defence was different from that of the other defendant.

* *Wilde*, Serjt., referred to the case of *Chippendale v. Mason*. (a)

TINDAL, C. J. I can only take it, that the two defendants have [*71] thought proper to intrust their defence to one attorney, who has put one defence, joining them, on the record. If he has acted improperly, he will be answerable. I think, that as Counsel are engaged for one defendant, the other defendant cannot be heard, and that upon a principle of public policy. Under the circumstances, I do not think it proper that two speeches should be made to the Jury. Then, with respect to who is to be preferred, I think I must hear my brother *Taddy*, because he is a Serjeant, and his duty requires him to appear.

The case then proceeded, and *Dr. Tucker* was not permitted to address the Jury, but he was allowed to cross-examine the witnesses.

It appeared, in the course of the argument, that application had been made to Mr. Justice Park, at chambers, to allow the defendants to sever in pleading, but his Lordship said, that as the only object was to have two speeches, he did not think it proper to grant the application.

Wilde and *Bompas*, Serjts., and *Follett*, for the plaintiff.

Taddy, Serjt., and *Chitty*, for defendant *Smyrdon*.

[Attorneys—*Fyson & B.*, and *Tucker*.]

(a) 4 Camp. 174. That case decides, that where several defendants appear by separate attorneys, and have separate counsel, if they are in the same interest, only one counsel can be heard to address the Jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joined.

See the case of *Doe v. Tyndale*, Vol. 3, of these Reports, p. 565.

*KAY v. GROVES. Oct. 31.

[*72]

A. signed a guarantee on the 18th November, by which he agreed to be answerable to B. for the amount of five sacks of flour, to be delivered to C., payable in one month. On the 19th. B. delivered five sacks to C. On the 21st, he delivered five sacks more. On the 24th, 3 sacks, 4 bushels, and 18 lbs., part of the first five sacks, were returned as of improper quality, and an equal quantity of different flour was sent in:—Held, that A. was not answerable on his guarantee for any more than that part of the first five sacks which was retained.

ACTION on a guarantee. The first count of the declaration stated, that, in consideration that the plaintiff, at the special instance and request of the defendant, would sell and deliver to one William Taylor on certain credit, to wit, one month's credit, divers, to wit, five sacks of flour, he, the said defendant, undertook, and then and there faithfully promised the said plaintiff, to be answerable to him for the price of the said five sacks of flour; and that he, confiding in the said promise, did then and there sell and deliver to the said William Taylor, on the said credit, five sacks of flour, the prices thereof amounting together to a certain reasonable sum, to wit, 17l. 10s., &c. There were counts for goods sold, &c. Plea—*Non assumpsit*.

The guarantee was in the following form:—

"I hereby agree to be answerable to Mr. Kay for the amount of five sacks of flour, to be delivered to Mr. W. Taylor, Gray's Inn Lane Road, payable in one month.

(Signed)

THOMAS GROVES.

"Dated 18th November, 1828."

It was proved by the carman of a Mr. Waters, a flour factor, that, on the 19th of November, 1828, five sacks of flour were delivered at Mr. Taylor's by the order and on the account of the plaintiff; on the 21st, five sacks more

were delivered; on the 24th, three sacks, four bushels, and eighteen pounds, were fetched away by the plaintiff's order, it having been objected to by Taylor as not of a proper quality; and on the same day the same quantity of other flour was sent in.—A sum of 3*l.* 17*s.* was paid into Court.

Wilde, Serjt., addressed the Jury for the defendant. Groves is Taylor's landlord; Kay has grossly deceived the defendant; he induced him to enter into the guarantee, by representing to him that another person had agreed to guaranty five sacks, and he was going to trust him for five sacks without any guarantee at all. If a man deceives another by his representations, and thereby obtains a guarantee, he cannot recover, for it is a fraud on the surety. It makes a great difference whether a man is to have other goods or not, because the one quantity alone may not be sufficient to do him any good. The cases all go to show that there must be fair dealing between the parties; and here the representation, that fifteen sacks were to be had, which turned out to be untrue, was a fraud upon the surety; and the plaintiff's claim cannot be supported. The payment of money into Court, only so far admits the goodness of the guarantee as to entitle the plaintiff to take the money out, but no further.

TINDAL, C. J., observed to *Jones*, Serjt., who was counsel for the plaintiff—The difficulty I feel with respect to your proof is, that you have not shown that the second quantity delivered was in substitution for the part of the first quantity which was returned. Though I think it would be a strict measure to say, that the return of a part, and the sending of other flour instead of it, was not within the guarantee, yet you cannot go farther, and take a quantity out from under a new and distinct contract. You ought to show that there was a quantity equal in amount substituted for that which was taken away. I think the payment of money into Court shows the guarantee to be good; but the money which has been paid in this case will go to cover the amount due for that part which was retained under the first order.

Jones, Serjt., in his reply, contended, that the guarantee was not confined to five specific sacks under any one delivery, but was good to the extent of five sacks, whether delivered under one order, and at one time, or not.

TINDAL, C. J. The allegation in the declaration, and the terms of the guarantee, being for one month's credit from a certain date, it must refer to one transaction. If things had gone on smoothly, the defendant would have become liable at the end of one month from the 19th of November; but it seems they did not, for some of the flour was objected to, and returned on the 24th of November. But, in the interval between the 19th and 24th, another parcel of five sacks was delivered. If there had been a substitution of any part for the quantity returned, that would have been a part of the transaction of the 19th; and then a question would have arisen as to the price. No evidence has been given of the price of the second quantity, nor of the order from the plaintiff for the delivery of it. His Lordship left it to the Jury to find a verdict for the plaintiff, if they should think that the second quantity was at all a substitution for the first; and, if not, to find a verdict for the defendant.

Verdict for the defendant.

Jones, Serjt., and *R. V. Richards*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attorneys—*Shuter*, and *Cox*.]

In the ensuing Michaelmas Term, *Jones*, Serjt., obtained a rule nisi for a new trial, which was, after argument, discharged.

RUTHERFORD v. EVANS, Clerk. Oct. 21.

The declaration, in an action for libel, averred, that the plaintiff carried on the business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward of a certain company, a society of persons called—"The New England Company;" and that the defendant published, concerning him, and concerning his said employment by the said company, and concerning him in his said trade of carpenter, builder, and surveyor, &c., in a letter to one J. G., he the said J. G. then and there being the treasurer of the said company, a certain libel, &c. It appeared, that the company in question was a corporation, and that its name was—"The Society for the Propagation of the Gospel in New England and parts adjacent. in America."—Held, that this misdescription of the company was not, under the circumstances, any ground of nonsuit.

It is no objection, that a part only of one sentence in a letter is inserted in a count for libel, if it appear, that enough is set out to comprise the substance of the charge made by the defendant against the plaintiff.

In an action of slander, the plaintiff, in showing special damage, must confine his proof to the evidence of persons who received the slanderous statements from the defendant himself.

LIBEL and slander.—The first count of the declaration stated, that the plaintiff, at the time of the committing of the *grievances complained of, carried on the trade and business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward of a certain company or society of persons, called "The New England Company;" and, in such capacity, had been and was employed by the said company, and had always conducted himself with credit, skill, &c., towards the said company, and all others employing him in the way of his said trade, &c., and had never been suspected of being guilty of any extravagance, &c., or of abusing the trust or confidence reposed in him by the said company, &c., or of having made default in payment of the moneys due and owing from him to his several creditors, &c., but was of good name, &c., and was gaining great profits in his said employment by the said company, and by his said trade and business, &c.; yet, the defendant, well knowing, &c., and intending to injure the plaintiff in his good name, &c., and to bring him into public scandal, &c., with the said company, and with and amongst his said employers, &c., falsely, &c., did compose and publish, &c., of and concerning the said plaintiff, and of and concerning his said business and employment by the said company, and of and concerning the said plaintiff, in his said trade of carpenter, builder, and surveyor, and of and concerning such default in payment of the moneys due and owing from the said plaintiff to his said several creditors, &c., a certain false, scandalous, malicious, and defamatory libel, in the form of a letter addressed to one James Gibson, he the said James Gibson then and there being the treasurer of the said company, containing, amongst other things, the false, &c., and libellous matter following, of and concerning the said plaintiff, and of and concerning his said business and employment by the said company, and of and concerning the said default in payment, &c., that is to say:—"I should have been silent, notwithstanding my anxious desire to put you upon your guard against the most artful scoundrel that ever existed. The natural punishment of his extravagance and misconduct is fast approaching—he is in every person's debt—*his ruin cannot be long delayed—and he is not deserving of the slightest commiseration."

The third count, contained a similar allegation of the employment by The New England Company, and charged, that, in a conversation with one John Fuller, "he, the said John Fuller, then and there being one of the members of the said company or society of persons, called, 'The New England Company,'" the defendant spoke of and concerning the plaintiff, &c., the false and defamatory words following, that is to say, "he is cheating and defrauding the company. He has sold timber and pollards belonging to the company, and never accounted for them, but cheated them of the money—he is defrauding the company in the bills charged for repairs, and in various other ways."

There were other counts for words spoken, but there was no evidence given which supported them. The declaration contained an allegation of special damage.

Pleas—Not guilty, and several special pleas of justification.

It appeared, from the cross-examination of Mr. Gibson, who was called on the part of the plaintiff, that the society referred to in the declaration, of which he was treasurer, was a corporation, and that its proper description was—"The Society for the Propagation of the Gospel in New England and parts adjacent in America."

The letter which constituted the libel, commenced with the words—"I am very sorry," &c., and continued thus—"I fully expected our friend would have seen you soon after, or I should have been silent, notwithstanding my anxious desire to put you upon your guard," &c. It also contained this additional passage—"I pledge my sacred honour, that, except to you and your friend, I have never disclosed this affair, nor ever will."

Taddy, Serjt., for the defendant. There are two objections to the declaration: *First*, There is an allegation, that the plaintiff was surveyor to a society, called "The *New England Company," and it appears that that is not the *77] name of the society, but its proper description is—"The Society for the Propagation of the Gospel in New England, and parts adjacent in America." This is a decided variance. Suppose there were an averment, that a person had been appointed surveyor to a certain company or society of persons, called "The East India Company," I apprehend that it could not be sustained, because there is no such society, but a corporate body of merchant adventurers trading to the East Indies. And in the present case, the company referred to is not a *society of persons*, but it is a body corporate, which is one person in law. It is also alleged in the declaration, that Mr. James Gibson was the treasurer of the said company, whereas, there is no such company. There is, therefore, a misdescription, both of the company itself, and of the person to whom the libel is said to be addressed. The *second* objection is, that the libel is not set out truly—only part of the letter is given. It may not be necessary to set out the whole of a letter, but a party must give all that bears upon the sense, or alters the character of the part recited. They begin with the words, "I should have been silent," whereas, the letter begins, "I am very sorry," &c. "I fully expected our friend would have seen you soon after, or I should have been silent." This is an omission of the reason given. The part inserted is of a positive kind, whereas it is qualified in the original, taking it altogether. It is an omission of the inducement to the communication, and of that which is material to show the confidential nature of the letter. They have also omitted other important words, *viz.* "I pledge my sacred honour, that, except to you and your friend, I have never disclosed this affair, nor ever will."

Merevether, Serjt., on the same side. A corporation has no legal existence but by name; and if the name is improperly set out, there is no description of *78] the corporation at all. With respect to the other objection, I *submit, that the effect of the part omitted goes to alter the remainder of the letter.

Wilde, Serjt., for the plaintiff. It is enough, if the plaintiff proves as much of his count as is necessary to support his action. There are allegations which state, that the plaintiff was a carpenter, builder, and surveyor, and which speak of creditors and employers generally. It is not necessary to give the name accurately; the corporate character need not be recognised here. This action is for nothing connected with the corporate character, but for slander concerning an individual. As to the other objection, the rule is, that you must set out so much of a libel as accurately conveys the imputation, which the letter, on its production, is found to contain. My friends on the other side confound the motive of the writer with the nature of the charge. The defendant calls the plaintiff a most artful scoundrel: this does not depend upon any part omitted. He also says, that his ruin is fast approaching, and that he does not deserve commiseration: this does not at all depend upon whether the defendant would, or would not, have made the communication in a certain event; it is perfectly immaterial whether, in another event, he would have been silent, as he was not silent in fact. The learned Serjeant then referred to the act of Parliament

relating to amendments in setting out written documents; and submitted, that, if it was material, his Lordship might direct an amendment.

Kelly, on the same side. In the case of *Figgins v. Cogswell*, 3 M. & S. 369, which was an action of slander, the declaration averred, that the plaintiff was a carpenter and sworn appraiser, and proof of his being a carpenter only was held sufficient. So, in the present case, the general allegation of the plaintiff's being a carpenter, builder, and *surveyor, is quite enough, without proving the employment by the company. Besides, the words "*called the New England Company*," may be taken to mean, *commonly* so called. If it is a variance at all, the omission may have been accidental, and, therefore, may be amended.

TINDAL, C. J. I do not think that I am at liberty to make the amendment suggested; because I think the act relates to mere verbal allegations, and the objection is, that it is an omission which alters the effect of the part set out. The first part contains only a portion of a sentence, which is clearly bad. But there is afterwards a whole sentence set out, and therefore I do not think it right to nonsuit. Nor do I think it right to nonsuit on the other point, because it seems to me to be only a matter of inducement to the action, and not that which is required to be strictly proved. But I give this opinion with diffidence, and will allow you to move upon both objections.

The case proceeded. And, to prove the special damage, several witnesses were called; one of whom stated, that in consequence of reports which he had heard, he refused to give the plaintiff credit.

Taddy, Serjt., objected, that the reports must be traced to Mr. Evans the defendant.

Wilde, Serjt., contended, that it was not necessary, as the greatest mischief might be done by reports set afloat by the defendant, and propagated by others.

TINDAL, C. J., thought that the plaintiff must confine himself to the evidence of persons who had the statements from the defendant himself.

The only verbal slander which was proved, consisted of the words relating to the sale of pollards mentioned in the third count.

The Jury found for the plaintiff—150*l*.

* *Wilde* and *Storks*, Serjts., and *Kelly*, for the plaintiff.

Taddy and *Merewether*, Serjts., and *Eagle*, for the defendant.

[Attorneys—*Eldred*, and *Few & Co.*]

[*80]

In the ensuing Michaelmas Term, a rule nisi for a nonsuit on both the points stated at the trial was obtained by *Taddy*, Serjt., which, after argument, and time taken to consider, was

Discharged.

BEFORE MR. JUSTICE GASELEE,

(Who sat for the Lord Chief Justice.)

SELLEN and WIFE v. NORMAN. Nov. 2.

If a servant has left his service for a considerable time, the presumption is, that all his wages have been paid. It seems that a master is not bound to provide a menial servant with medical attendance and medicines during sickness; but if a servant fall ill, and the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master and servant that he should do so.

ASSUMPSIT for the work and labour of the plaintiff's wife, as a menial servant, before her marriage. Plea—General issue, with a notice of set-off for money paid.

This action was brought for a year's wages, alleged to have been unpaid; and the defence was, that the defendant had paid a larger sum for medical attendance on the wife, while in his service.

The evidence was very loose and contradictory, as to dates, but it appeared that, some time in the year 1821, the female plaintiff (being then unmarried) entered into the service of the defendant, to be paid either ten or twelve guineas a year, the witness could not remember which, and that she remained till the year 1824; and that, after being away for about three months, she, at the defendant's desire, returned into his service, and remained till the year 1827. It was admitted *81] that she had been ill *for a considerable time during the service, and that she was attended by the surgeon who was usually employed to attend the defendant's family; and it was proved that the surgeon had been paid for this attendance by the defendant; and one witness stated, that he had heard the female plaintiff say, that she had left part of her wages in her master's hands, to pay the doctor's bill; however, the evidence of this witness was, in other particulars, rather confused.

Wilde, Serjt., for the plaintiff. The master, while a household servant remains in his house, is bound to be at the expense of proper and necessary physic for such servant, the same as he would be for necessary meat and drink. The master might, undoubtedly, put an end to the contract; but if he does not do so, and keeps the servant in his house, he is bound to provide her necessary medicine. I admit that a servant who is not supported by his master, such as an agricultural servant, is not to have his physic allowed him at his master's expense; that has been decided, but it has never been so decided with regard to a household servant, while he remains in the house of his master. I also submit, that, as the defendant has paid the surgeon, it is manifest that the surgeon was employed on his credit, and not on that of the servant.

GASELEE, J. (in summing up.) The first thing to be considered is, whether all the wages really due to the plaintiffs have not been paid. In the regular course, if a servant has left a considerable time, the presumption is, that all the *82] wages have been paid; (a) and that makes it *proper to consider whether, in this case, the facts proved rebut that presumption. I am not prepared to say, that a master is bound to provide a menial servant with medicine; *83] with respect to some other servants he is clearly not so; (b) *however, though it is often done by masters for their menial servants, I do not

(a) In a case tried a few years ago, at Guildhall, which was an action by a workman at a sugar refiner's, a witness proved that the plaintiff had worked there for more than two years. But *Abbott, C. J.*, said that he should direct the Jury to presume that men employed in that way were regularly paid every Saturday night, unless some evidence was given on the part of the plaintiff, to satisfy the Jury that the plaintiff had, in point of fact, never been paid; and as no such evidence was produced, the plaintiff was nonsuited.

It would often save persons great inconvenience and expense, if, when they paid a servant's wages, they took a regular receipt.

(b) In the case of *Newby v. Wiltshire*, 2 Esp. 739, where a farmer's servant, while attending his master's wagon, had broken his leg; it was held by Lord Mansfield, Willes, Ashurst, and Buller, Js., that the master was not liable to reimburse the overseer of the parish for the amount paid for medicines for this servant; and Lord Mansfield said, "There is, in point of law, no action against the master, to compel him to repay the parish for the cure of his servant; no authority has been cited, but it seems to me that it cannot be, the parish is bound to take care of accidents." In the case of *Scarman v. Castell*, 1 Esp. 270. Lord Kenyon held, that a master was bound to pay for medicines supplied to his servant while under his roof and part of his family. In the case of *Simmons v. Wilmott*, 3 Esp. 91, which was an action against the parish officers by a person who had taken care of a man named Shaw, who was the carter of a person named Willan, who had met with an accident: Lord Eldon held, that the parish officers were liable; and his Lordship said, "Lord Kenyon has ruled, that a servant, living under the roof of his master, falls sick, the master is liable for medicines provided for the servant, if his illness has not been the consequence of his own misconduct or debauchery. If Shaw had been a person of that description, Willan would have been liable." In the case of *Wennall v. Adney*, 3 B. & P. 247, the plaintiff, a surgeon, brought an action against the defendant, for the amount of his bill for attending a servant of the defendant, who had broken his arm in the defendant's service. To this servant, the defendant gave 3*l.* 10*s.* and his victuals. The Court of Common Pleas held, that the defendant was not liable. In that case, Lord Alvanley, C. J., said, "I have reason to believe that the opinion delivered by Lord Kenyon, in the case of *Scarman v. Castell*, was not a hasty opinion, but formed upon reflection. In this kind of question, much may depend upon the nature of the contract entered into between the master

think I should be authorized in saying that they are bound so to do; but if a master, when a menial servant falls ill, calls in his own medical man, I think he cannot afterwards charge that against the servant's wages, unless there be some special contract between the master and servant, that he should do so. The question is, was there any contract made between this person and her master, that she should repay him the amount of this apothecary's bill; for, if she never made any such contract, I think she is not liable to be charged with it. There is evidence of a service for a very considerable period, and, in answer to the evidence of service, there is the presumption of payment. If you think that she has been paid, you will find for the defendant; but if, upon the evidence, you think that she has not been paid all that is due to her, you will find for the plaintiffs, for the amount of wages for such time as you think the female plaintiff served and has not been paid.

Verdict for the plaintiffs.—Damages, 10*l*.

Wilde, Serjt., and *Steer*, for the plaintiffs.

Andrews, Serjt., for the defendant.

[Attorneys—*R. Hill*, and *T. Edis*.]

and the servant. Sometimes a master engages to supply his servant with necessary victuals; and it may, undoubtedly, be argued, that necessary victuals may mean such victuals as may suit the state of health or infirmity in which the servant happens to be, as, if a servant be in need of wine, or victuals of that description, which are given by way of medicine. I have no doubt whatever, that parish officers are bound to assist where such accidents as these take place; and that the law will so far raise an implied contract against them, as to enable any person who affords that immediate assistance, which the necessity of the case usually requires, to recover against them the amount of the money expended." *Rooke and Chambre, Js.*, were of opinion, that a master is not liable to furnish his servant with medicine, unless there be some stipulation to that effect; and *Heath, J.*, said, "I believe that the humanity of Lord Kenyon misled him, when he adopted the doctrine on which he decided the case of *Scarman v. Cartell*." See the case of *Watling v. Walters*, 1 C. & P. 132, and the note to that case.

*BEFORE LORD CHIEF JUSTICE TINDAL.

[84]

DRAPER v. THOMPSON. Nov. 5.

A. gave B. authority to distrain on the goods of C., and gave him an indemnity against all costs and charges that he might be at "on that account." B. made the distress, and his men being told by the son of C. that a certain cask contained spent liquor, of no value, they took the cask to pieces, and let the liquor run off. It was, in fact, cochineal dye, belonging to D. For the wasting of it D. recovered damages against B. in an action of trover. Held, that B. could not recover the amount of those damages from A. in an action on the indemnity, and that such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress.

ASSUMPSIT. The first count of the declaration stated, that, in consideration that the plaintiff would act as the broker and agent of the defendant, and would seize and distrain the goods and chattels then in the possession of Thomas Danvers, at, &c., for 103*l*. 0*s*. 3*d*., arrears of rent then alleged to be due, the defendant undertook, &c., to indemnify him against all costs and charges in respect to any law expenses, action or actions, that might arise, or which might be brought against the plaintiff on that account. The plaintiff then averred, that he seized divers goods of Thomas Danvers; and that, in Trinity Term, 8 Geo. 4, a certain action at law was brought against him by one William Godfrey Kneller, in his Majesty's Court of King's Bench, "for and on account of the said seizure and distress;" and that thereby he was forced and obliged to pay a large sum of money; yet the defendant, not regarding, &c., did not, nor would, indemnify, &c. The second count was more general in its form; and the declaration also contained the money counts. Plea—General issue.

Taddy, Serjt., for the plaintiff, opened. That, in the month of December, 1826, the plaintiff was employed by the defendant to distrain the goods of Thomas Danvers, for an arrear of rent then due from Thomas Danvers to the defendant; and that the following indemnity was given by the plaintiff to the defendant:—

“Know all men by these presents, I do hereby authorize Mr. William Draper, 22 Wellesloe Square, or his agent, as my agent, to seize and distrain the *85] goods and *chattels now in the possession of Mr. Thomas Danvers, situate and being No. —, in Gower's Walk, in the parish of Saint Mary, White-chapel, in the county of Middlesex, for the sum of 103*l.* 0*s.* 3*d.*, being for arrears of rent due to me for the same, on the 25th day of December last; and, for your so doing, this shall be your sufficient warrant, authority, and indemnification against all costs and charges, in respect to any law expenses, action or actions, that may arise; and, as well as any other and all other charges or expenses that you or your agent may be at, or brought against you or your agent on this account. As witness my hand, this 26th day of December, 1826.

(Signed)

JAMES THOMPSON, JUN.

Executor of the late landlord of the said premises.”

Taddy, Serjt., stated, that, under this authority, the plaintiff entered and made the distress on Danvers, and that the plaintiff's men, finding a large cask in a part of the premises, which was too large to be brought out entire, took it to pieces. This cask contained something that looked like muddy water, which the son of Danvers told them was spent liquor, of no value; but it was, in fact, valuable cochineal dye, belonging to a person named Kneller, who brought an action of trover against the plaintiff for the spilling of it, and recovered 50*l.* damages.

TINDAL, C. J. I think this is not an indemnity against the acts of the plaintiff's own men.

Taddy, Serjt. As the terms of the indemnity go to all actions brought against the plaintiff on account of this distress; I submit, that it covers everything that is done, *bonâ fide*, in the progress of the distress. If the plaintiff had done any wilful mischief, or been guilty of any wilful default, it would not cover that. But I apprehend, that it protects the plaintiff from all actions brought against him on account of his making the distress, if they arise *86] *from mistake or accident. If it only extended to cases where he was justified, it would be of no use, as he would not then want an indemnity.

TINDAL, C. J. It never could be intended, that the defendant was to indemnify the plaintiff against the acts of his own servants; and I am of opinion, that it only applies to cases where a distress was illegal, because the landlord had no right to put in such distress.

Nonsuit.

Taddy, Serjt., and *Carrington*, for the plaintiff.

Wilde, Serjt., and *Hutchinson*, for the defendant.

[Attorneys—*Ewington*, and *Swaine & Co.*]

PROMOTIONS.

IN this vacation William Henry Tinney, Thomas Pemberton, Charles Ewan Law, and James Lewis Knight, Esqrs., were appointed to be his Majesty's Counsel learned in the law.

In Michaelmas Term, 1829, Willam Bolland, Esq., was promoted to be one of the Barons of the Exchequer, vice Sir John Hullock, Knt., deceased.

*COURT OF KING'S BENCH.

[*87]

SITTINGS AT WESTMINSTER AFTER MICHAELMAS TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

The WEST MIDDLESEX Water-Works Company v. SUWERKROP and Another. Dec. 2.

A. acted as the owner of premises, and made a contract with a water company to supply the premises with water at a certain height. In his absence his men, to the injury of the company, fixed the pipe at a higher level. After it was done, A. knew of it. A. was not in fact the owner of the premises. Held, that he was liable in an action on the case brought by the company. A contract with a water company for the supplying of premises with water does not require a stamp.

CASE. The declaration stated, that the defendants, being in possession of certain premises, which were supplied with water by the plaintiffs, wrongfully obtained water in greater quantities, and at a higher level, than they were entitled to. (a) Plea—Not Guilty.

*It appeared that, in the year 1825, the defendant Suwerkrop had entered into an agreement with the plaintiffs to supply the premises in question with water. Over the gateway of the premises was painted, "Portable Bath Company." And this supply of water was to have been made at the basement story. [88]

To prove this agreement, the plaintiffs' counsel offered in evidence a written proposal from the plaintiffs' secretary, to supply these premises with water, at

(a) The first count of the declaration was as follows:—

That the said J. H. S., before, and at the time of committing of the grievances by the said defendants hereinafter mentioned, was possessed of certain buildings and premises, and being so possessed thereof, he the said J. H. S., long before, and at the time of committing of the said grievances, had been and was supplied by the said company with a certain quantity of water from time to time at certain rates or sums of money, payable by the said J. H. S. to the said company for the same, to wit, at the parish of St. Mary-le-bone, in the county of Middlesex; and that the said water, before and at the time of committing of the said grievances, had been and was used and accustomed, during all the time aforesaid, to be laid in and supplied to the said buildings and premises of the said J. H. S., and conveyed and deposited into a certain cistern or reservoir at the height of the basement story of such buildings and premises by means of a certain branch pipe, communicating and uniting with certain main pipes of and belonging to the said company, to wit, at the parish aforesaid in the county aforesaid. Nevertheless, the said defendants, well knowing the premises, and that the said water was not to be laid on the said buildings and premises of the said J. H. S., higher than the said basement story of his said buildings and premises, nor in any other manner, nor in any greater quantity than what had before then been used and accustomed to be supplied to his said premises by means of such branch pipe as aforesaid, without the license and consent of the said company for that purpose first had and obtained, but the said defendants contriving, and fraudulently intending to deceive, injure, and defraud the said company of divers large quantities of water, and of divers gains and profits arising therefrom, heretofore, to wit, on the first day of January, 1826, and on divers other days and times between that day and the day of exhibiting the bill of the said company against the said defendants in that behalf at the parish aforesaid, in the county aforesaid, unlawfully, wrongfully, fraudulently, and deceitfully, and without the leave or license of the said company for that purpose first had and obtained, raised and got, and caused and procured to be raised and gotten from the main pipes of the said company, divers large quantities of water, to wit, one hundred thousand barrels of water of the said company, over and above the quantity of water which had been before then used to be supplied by the said company to the said buildings and premises of the said J. H. S., as aforesaid; and also caused the same to be laid on the said buildings and premises of the said J. H. S. much higher than the said basement story thereof; by means of which said several premises the said company lost and were deprived of such additional quantity of water so wrongfully raised and gotten as aforesaid, and of divers gains and profits, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, which might and would otherwise have arisen and accrued to them thereupon. And the said company had been and were otherwise greatly injured and damaged, to wit, at the parish aforesaid, in the county aforesaid.

There were two other counts for taking the water in too large quantities.

the height of the basement story, at a certain rate of payment. This proposal the defendant Suwerkrop accepted, by a memorandum written on the same paper, which was not stamped.

Campbell and Holt, for the defendants, objected, that this paper required an agreement stamp.

*89] **Scarlett*, A. G., and *Denman*, *contrd.* It is within the exception in the stamp act, which exempts a contract for the sale of goods, wares, and merchandise.

Lord TENTERDEN, C. J. I think so.

The contract was read.

It was proved, that, after the making of this contract, a pipe had been secretly put on the plaintiffs' high service pipe, so as to draw off the water at a higher level than that agreed for. It was admitted that this would be injurious to the company.

The defence was, that Mr. Suwerkrop was not the owner of the premises in question, and not in the possession of them; and that, therefore, he was not answerable for the laying on of this pipe. And further, that this had been done in his absence from London by some of the men employed there, to save themselves the labour of pumping up the water. However, it was contended, on the part of the plaintiffs, that Mr. Suwerkrop must have know of it after it had been done.

Lord TENTERDEN, C. J. It has been said, on the part of the defence, that the defendant Suwerkrop is not in the possession of these premises; but the question is, whether he has not held himself out to the plaintiffs as being so. If he held himself out as the owner, he is answerable; and if it were not so, you would always have a real and a nominal proprietor; the only person you would know would be the latter; and when you brought your action against him, you would have the other person put forward. It is also said, that this was done when he was out of town. Perhaps that was so, but he is answerable for the acts of his servants, if he adopted those acts; and it is clear, that he did so in this case, as he must have known of the existence of this pipe. The questions are, whether he did not adopt the acts of his servants in setting up *90] this pipe; *and whether he did not hold himself out to this company as the owner.

Verdict for the plaintiffs.—Damages, 20*l.*

Campbell. I hope that your Lordship will give me leave to move to enter a nonsuit on the objection respecting the stamp.

Lord TENTERDEN, C. J. I think I ought not. The more I consider it, the stronger my opinion is.

Scarlett, A. G., *Denman*, and *Comyn*, for the plaintiffs.

Campbell and Holt, for the defendant Suwerkrop.

[Attorneys—*E. Bailey*, and *W. Searle*.]

*NOBLE and Another, Assignees of ROWE, a Bankrupt,
v KERSEY. Dec. 2.

If a person, after notice of an act of bankruptcy, sets up a claim of lien upon certain deeds, and the bankrupt pay the sum he demands to get possession of the deeds; the assignees cannot question the amount of this lien, unless there be a count for money had and received to the use of the assignees; but if the person had really no just claim at all, the assignees may recover back the sum in an action for money had and received to the use of the bankrupt; however, if it appear that the defendant never received any money, but that A., who was to have conveyed a house to the bankrupt, at his desire mortgaged it to the defendant, an action for money had and received will not lie.

ASSUMPSIT. The declaration contained a count for money had and received to the use of the bankrupt, with a promise to pay the assignees, and also a count upon an account stated with them. Plea—General issue.

Campbell, for the plaintiffs, opened, that this action was brought to recover a sum of 135*l.*, and that the bankrupt, being in difficulties, had applied for assistance to the defendant, who was a certificated conveyancer; and that the defendant having had certain deeds of the bankrupt in his possession, he claimed a lien to a certain amount, and would not part with the deeds till he was paid this sum. This sum had been paid, and he contended, that the *assignees [91] were entitled to recover it back, as it would be proved to be a payment after the defendant had notice that the bankrupt had committed an act of bankruptcy; and that, under those circumstances, the question, whether the defendant had a lien on the deeds, would become immaterial.

Scarlett, A. G. There is no count for money had and received to the use of the assignees. (a)

Lord TENTERDEN, C. J. How can this be got over?

Campbell. If money is demanded upon a claim of lien, and there be no lien, and a party pays the demand to get possession of his deeds, he may recover back the sum in an action for money had and received; and, therefore, the count for money had and received to the use of the bankrupt is sufficient.

Scarlett, A. G. The case of *Bilbie v. Lumley*, 2 Ea. 469, decides, that a payment made with full knowledge of the circumstances cannot be recovered back.

Campbell. That is only if the payment is voluntary; here it is upon compulsion.

Lord TENTERDEN, C. J. You must show that there was no lien.

Campbell. Or, that there was no lien to the amount claimed.

Lord TENTERDEN, C. J. Can we try the amount of the lien?

Campbell. If the defendant claimed too much, I submit that we might recover back the overplus; but I shall deny *that this sort of certificated conveyancer has any lien at all. [92]

The bankrupt was called. He stated that he had had dealings with the defendant, who had had possession of certain deeds belonging to him, and that the defendant refused to deliver up these deeds, unless the amount of a lien which was claimed by him was satisfied. The bankrupt stated that he did not consider that he owed the defendant anything, but that, as it was very important to him to get possession of his deeds, he desired his brother, who was to have conveyed a house to him (the bankrupt), to grant a mortgage of it to the defendant; which having been done, the defendant gave up the deeds.

Campbell. The effect of this is, that the bankrupt's brother, instead of paying the bankrupt, pays the defendant.

Lord TENTERDEN, C. J. The plaintiffs seek to recover in this action, which is an action for money had and received, although the defendant has never, in fact, received any money. It stands thus: This man is to have a house of his brother, and his brother mortgages it to the defendant. Now, no money passes at all; and if the house is not worth the amount of the mortgage, the defendant will never receive the money. This is an extorted mortgage, and not an extorted payment. Whether you can get back the mortgage deed by any other mode of proceeding is quite another question. The plaintiff must be called. Nonsuit.

Campbell and Hutchinson, for the plaintiff.

Scarlett, A. G., and Chitty, for the defendant.

[Attorneys—*Burt & D., and Goode.*]

(a) See the case of *Tucker v. Barrow*, 3 C. & P. 85.

In the case of *Hollis v. Claridge*, 4 Taunt. 807, where the defendant, a certificated conveyancer claimed a lien upon a lease, *Gibbs, J., said, "If the plaintiff had employed the defendant to look into the lease, he would, I think, have been entitled to retain the lease till he was paid for the work which he had performed on it, without reference to the question whether he is an attorney or not; for I think the distinction is, that if this lease was delivered to the defendant by a person having a right to dispose of it, that he might do anything upon this particular deed; by the general law of the land he has a lien upon it, whether he is an attorney or not. If it were another deed than that on which the operation is to be performed, it would be necessary for him to be an attorney to have the benefit of the custom, and to enable him to retain other papers than those on which the work is to be done."

In the case of *Poucher v. Norman*, 5 D. & R. 648, it was held, that a certificated conveyancer might maintain an action for his fees.

See the case of *Crammond v. Crouch*, 3 C. & P. 77.

OWEN v. BOWEN. Dec. 2.

A. gave a sum of money into the hands of B. to pay to C.; B. had not paid it over to C. Held, that if C. had not consented to receive this sum of B., A. might countermand the authority, and recover it back from B.

If A. agrees to serve B. as an apothecary's assistant at such salary as C. should think reasonable, and it appear that no application had been made to C. to fix any salary, A. cannot recover anything for his services in an action for work and labour.

ASSUMPSIT for work and labour as an assistant to a surgeon and apothecary, and for 8*l.* money had and received. There were also the other money counts. Plea—General issue.

With respect to the sum of 8*l.*, it appeared that the plaintiff had entered as a perpetual pupil to Mr. Jones, of Hatton Garden, who was a medical lecturer, and that the sum to be paid to him was 22*l.*, of which 4*l.* had been paid by the plaintiff, and 10*l.* by the defendant; and that the remaining 8*l.* had been placed by the plaintiff in the hands of the defendant, who had given the following memorandum:—

“Nov. 8th, 1828.

“I have received of Mr. Owen the sum of eight pounds, which sum I have engaged to pay to Mr. Jones, of Hatton Garden.

(Signed) E. BOWEN.”

Mr. Jones stated, that the plaintiff had entered himself as pupil to him, but that he knew nothing of this memorandum; and that he never consented *94] to take the sum of 8*l.* *from the defendant. Before the present action was brought, the plaintiff sent notice to the defendant, requiring him to pay back the sum of 8*l.*, and countermanding the authority to pay it to Mr. Jones.

With respect to the claim for salary as a surgeon's assistant, it appeared that the defendant was a surgeon and apothecary, and that the plaintiff had acted as his assistant from the month of June 1827 to the month of January 1829; but it was admitted that the first year of his service was to be gratuitous. There was also a sum of 1*l.* 14*s.* 8*d.* claimed, but on this no point arose.

For the defence it was proved, with respect to the 8*l.*, that the plaintiff had said that the defendant was to hold it till the plaintiff was capable of passing his examination at Apothecaries' Hall, and then to pay it over to Mr. Jones; and, with respect to the service, a witness proved the signing of a written agreement between the parties.

This agreement was unstamped, and had two seals.

Comyn, for the plaintiff. It is a deed, and must be stamped accordingly.

Lord TENTERDEN, C. J. The mere sealing does not make it a deed. It must have been delivered as a deed. I see that the attestation is only “signed and sealed in the presence of.”

The subscribing witness, in answer to a question by his Lordship, said, that he merely saw the parties sign this paper.

Comyn. I submit that it must bear an agreement stamp.

Lord TENTERDEN, C. J. Mr. *Comyn*, you will gain no advantage by rejecting this paper; because, then it will appear, that the service was under a written agreement, which you have not put in.

*95] *The agreement was read. It was dated on the 1st of June, 1827; and by it the plaintiff agreed to serve the defendant one year gratuitously, and after that to receive such salary as Mr. Condell should think reasonable.

It was admitted that no application had been made to Mr. Condell to fix any salary.

Comyn, in reply. By the acknowledgment, it is clear that this sum of 8*l.* was the money of the plaintiff, and it is equally clear that he may revoke the authority given to the defendant to pay it over to Mr. Jones, unless that mode of payment had been adopted by Mr. Jones. If Mr. Jones had looked to the defendant for payment, it would have been different; but, as it is not so, the plaintiff is at full liberty to revoke the authority. In the case of *Gibson v.*

Minett, 1 C. & P. 247, where the plaintiff had directed his bankers to hold a certain sum of money from his private account, at the disposal of a third person, and the bankers accepted this order; it was held, that the plaintiff might countermand his order at any time before the banker had paid the money to such third person, or made an appropriation to his credit, or entered into some equivalent arrangement with him incompatible with a countermand of the order. With respect to the salary, it will be for his Lordship to say, whether we can recover, without proving the salary fixed by Mr. Condell.

Lord TENTERDEN, C. J. I do not think that you can recover the salary without Mr. Condell.

Busby, for the defendant. In a late case it was held, that if A. directs B. to pay money to C., and B. pledges himself to do so, the authority cannot be revoked.

Lord TENTERDEN, C. J. The difference here is, that Mr. Jones does not look to the defendant for payment.

*Lord TENTERDEN, C. J., (in summing up). It is clear that 8*l.* were put into the hands of the defendant to pay over to Mr. Jones, with a ^[*96] qualification, as the defendant's witnesses say, that the defendant was not to pay it over till the plaintiff was able to pass his examination at Apothecaries' Hall. If you think that Mr. Jones consented to take the 8*l.* of the defendant, when the plaintiff should be able to pass the examination, the defendant is entitled to a verdict; but if you think that Mr. Jones looked all along to the plaintiff for payment of this sum, the plaintiff is entitled to recover it back from the defendant.

Verdict for the plaintiff.—Damages, 9*l.* 14*s.* 8*d.*

Comyn, for the plaintiff.

Busby, for the defendant.

[Attorneys—*Rye*, and *Alexander*.]

ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1829.

BEFORE MR. JUSTICE J. PARKER.

(*Who sat for the Lord Chief Justice.*)

TAYLOR, Gent., one, &c. v. M'GAUGAN and Others. Dec. 5.

A solicitor to a commission of bankrupt may maintain an action for the amount of his bill up to the choice of assignees, without having had his bill taxed by the commissioners, under s. 14 of the bankrupt act, 6 Geo. 4, c. 16, that provision applying only to cases between the assignees and the estate.

ASSUMPSIT for a solicitor's bill, for business done by the plaintiff as a solicitor to a commission of bankrupt, against James Dignum, before the choice of assignees. Plea—General issue.

The bill was for business done before the choice of assignees. It was proved that the business had been done, *and the commission and assignment ^[*97] were put in. The acceptance of the situation of assignees, signed by the defendants, was also put in, and evidence of their signing it given. It was also proved, that the bill had been delivered more than a month before the bringing of the present action.

Rowe, for the defendant, cited sect. 14 of the stat. 6 Geo. 4, c. 16, (a) and

(a) By which it is enacted, "That the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the com-

contended, that, before any action could be brought on a solicitor's bill for business done by the solicitor to a commission of bankruptcy before choice of assignees, it was essential that he should have had his bill taxed, either by the commissioners, or by the proper officer of the Court in which the business was done.

Campbell, contra, relied on the case of *Finchett v. Howe*,^(a) which was a case decided before the passing of the stat. 6 Geo. 4, s. 16: and he cited the *98] case of *Crowder v. Davis*, decided in the Court of Exchequer, in which it was held, that the stat. 6 Geo. 4, c. 16, did not alter the law in this respect from what it was under the former act.

Mr. Justice J. PARKE. I am of opinion, that this section only applies to cases between the assignees and the estate; because, by the latter part of it, I find that it is enacted, that any creditor to the amount of 20*l.*, who is dissatisfied with the commissioners' taxation, may have the bill taxed by a Master in Chancery.

Rowe. I hope that your Lordship will reserve the point.

Mr. Justice J. PARKE. I have no doubt about it.

Verdict for the plaintiff.

Campbell, and *Archbold*, for the plaintiff.

Rowe, for the defendants.

[Attorneys—*J. M. Taylor*, and *Pike*, and *Humphreys*.]

missioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission for business done after the choice of assignees, shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the Court in which such business shall have been transacted, and the same, so settled, shall be paid by the assignees to such solicitor or attorney: Provided that any creditor who shall have proved to the amount of twenty pounds or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof, twenty shillings, and no more."

(a) 2 Camp. 275; and see the case of *Pocock v. Russell*, ante, p. 14.

CHIPPENDALE, Executor of HOLMES, v. THURSTON. Dec. 5.

A payment of interest within six years by one of the makers of a joint and several promissory note, more than six years old, will take the case out of the statute of limitations, as against the other maker of the note; and the stat 9 Geo. 4, c. 14, has not altered the law in this respect. And if this interest was one of the items in an account of which the party paid the balance, that is a sufficient payment of interest. If A. agree to re-invest a sum in the 3*l.* per cent. consols in the name of B., charging the stock at a price not exceeding 68½ per cent., or to repay the sum in bank notes on B. giving A. six months' notice, it is in the election of B., whether he will have the money re-invested, or paid in bank notes. In general, the election is in the party who is to do the first act.

ASSUMPSIT on a promissory note. Pleas—The general issue, and the statute of limitations.

The note was in the following form:—

"Bath, 30th July, 1819.

"On demand, we jointly and severally promise to pay Richard Holmes, Esq., the sum of 200*l.*, with five per cent. interest.

THOMAS EVANS.

H. THURSTON."

*99] *Mr. Evans, the joint maker of the note, was called to prove the defendant's handwriting; and he proved, that the following memorandum was written on the back of the note at the time of the making of it:—

"I hereby agree to re-invest the within sum of 500*l.* in the 3*l.* per cent. con-

sols, in the name and to the account of Richard Holmes, Esq., the price to be charged to him not exceeding 68½ *per cent.*, or to repay the said amount in Bank of England paper, on his giving me six calendar months' notice in writing to this effect.

THOMAS EVANS.

"Bath, 30th July, 1819."

To take the case out of the statute of limitations, a payment of interest by Mr. Evans was relied on, and he produced an account, settled between him and Mr. Holmes, the testator, in the year 1824, which contained an item of 25*l.* for interest on this note; and he stated, that the balance against him on that year's account was 171*l.*, and that that was carried into his next year's account with the testator, and that he, in that year, paid the testator more than 171*l.* He also stated, that he had given the testator credit in account for all the interest due on this note down to October, 1826. The testator died in the year 1827.

Gurney, for the defendant. I submit, that, since the passing of the stat. 9 Geo. 4, c. 14, (a) a payment to take the case out of the statute of limitations, must be by the party to be charged in the action. By the 1st section of that statute, it is enacted, that no acknowledgment or promise shall be sufficient to take the case out of the statute of limitations, unless such acknowledgment or promise be in writing, and signed by the party; and then follows a proviso, that that act shall not lessen the effect of any payment of interest.

*Mr. Justice J. PARKE. The words of this proviso in the stat. 9 Geo. 4, c. 14, are, that "nothing herein contained shall alter, or take away, or [*100 lessen, the effect of any payment of any principal or interest, by any person whatsoever." I think, therefore, that this statute leaves the law, with respect to payment of interest, just as it was before; and, as the law stood before the passing of this act, a payment of interest by one of two joint makers of a promissory note would take the case out of the statute of limitations as to both. And I think, that these sums, being allowed in account, are equivalent to payments.

The defence was, that this loan to Mr. Evans was usurious, and that the promissory note was, therefore, void.

Mr. Justice J. PARKE. Mr. *Thesiger*, how do you get over the memorandum at the back of the note?

Thesiger. I submit, that it is no part of the note.

Mr. Justice J. PARKE. Take it so; the note is then a security for the agreement on the back of it; and by that, Mr. Holmes is sure of 5*l.* *per cent.* for his money; and he may, if the funds are above 68½, get more.

Thesiger. That is in the option of the borrower of the money.

Mr. Justice J. PARKE. I think not; the repayment of the money, or the re-investment of the stock, is to be done upon a notice, to be given by the lender.

Gurney, for the defendant, addressed the Jury, and put in several letters which had passed between Mr. Holmes and Mr. Evans, previously to the advance of the money; and from these it appeared, that Mr. Holmes was to have *the [*101 option, whether he would be repaid in money, or have the stock re- placed, according to the memorandum.

Mr. Justice J. PARKE. This cannot be got over.

Thesiger. I submit, that these letters prove nothing, as we must look at the final agreement between the parties.

Mr. Justice J. PARKE. If usury is alleged, we must look at the whole transaction. Besides, I am of opinion, that the election is in the party who is to do the first act, which, here, is the giving of the notice. The promissory note is only to be resorted to, in case the stocks do not rise. If they rise above 68½, the lender is to have his stock replaced. I think, that whether the stock shall be replaced, or the loan be repaid in money, is in the option of the lender; *primâ facie*, the option is in the person who is to do the first act, and that, here, is the giving of the notice.

Nonsuit.

(a) The stat. 9 Geo. 4, c. 14, will be found, 3 C. & P. 298.

Thesiger, for the plaintiff.

Gurney, and *Justice*, for the defendant.

[Attorneys—*J. Clayton*, and *Nettleship & W.*]

Lord Coke says (1 Inst. 145 a), "In case an election be given of two several things, always he that is the first agent, and which ought to do the first act, shall have the election; as if a man granteth a rent of twenty shillings, or a robe, to one of his heirs, the grantor shall have the election, for he is the first agent, by payment of the one, or delivery of the other; but if I give unto you one of my horses in my stable, there, you shall have the election, for you shall be the first agent, by taking or seizure of one of them." In the case of *Layton v. Pearce*, Doug. 16, Lord Mansfield says, "In point of law, the person who is to perform one of two things in the alternative, has the right to elect."

*102] *DUPEN *v.* KEELING and Another, Gents., two, &c. Dec. 5.

If an attorney sue out a writ against A., at the suit of B., without any authority, express or implied, from B. for so doing, and A. pay the costs of such writ to the attorney, A. may recover back the amount of those costs, by bringing an action for money had and received against the attorney; but if the attorney had any authority, either express or implied, from B., to sue out the writ, such action for money had and received will not lie against the attorney, even though B. had no cause of action against A.

MONEY had and received. Plea—General issue.

It appeared that a bill of exchange for 10*l.* had been drawn by a person named Clark, upon the plaintiff, and accepted by him, and by Clark endorsed to a person named Plunkett, for whom it was discounted by the defendants. It was proved by the clerk of a notary that this bill of exchange was presented for payment by their direction, and that it was dishonoured. It also appeared, that writs were sued out, after the dishonour of the bill, against the plaintiff, Clark, and Plunkett; the defendants suing them out as the attorneys of a person named Saunders. After this, Mr. Cox, the plaintiff's attorney, paid the defendants the amount of the bill of exchange, and also 1*l.* 16*s.* 6*d.* for costs in the action against Clark, and 4*l.* 4*s.* for the costs of the two other actions against the plaintiff and Plunkett. Mr. Cox stated, that the defendants refused to tell him who Saunders was, and Plunkett also proved that he did not know him; and on the bill of exchange being put in, it appeared that the name of Saunders was not upon it. It was, therefore, imputed that Saunders was merely a nominal plaintiff. And it was also proved by Mr. Cox that the Master would have disallowed 1*l.* 12*s.* on the bills of costs; and that the Master would not have allowed a charge of 1*l.* 1*s.* for instructions to sue, if the defendants themselves had sued on the bill of exchange.

Archbold, for the defendants. I submit, that the plaintiff must be nonsuited. It is clear that writs were issued after the bill was dishonoured, and, therefore, some costs must have been due; and if there were any overcharges in the bill of costs, the only proper way of getting them taken off was by applying to have the bill taxed.

*103] *Mr. Justice J. PARKE. If Saunders was a mere imaginary plaintiff, no costs at all would be due.

Archbold. There is no evidence that there is no such person as Saunders.

Mr. Justice J. PARKE. I think there is *prima facie* evidence of it.

Archbold, for the defendants, addressed the Jury, and stated, that, after the defendants had discounted the bill, and before it became due, they paid it away to a person named Saunders for painter's work; but that he, thinking that the defendants, as attorneys, were more likely to obtain payment from the acceptor than he was, placed the bill in the defendants' hands to get the money, and sue all the parties if the bill was not paid.

James Saunders was called, and he proved the above statement; but the plaintiff's counsel, in reply, asked the Jury to disbelieve his evidence.

Mr. Justice J. PARKE (in summing up). The ground on which this action

is to be supported, is, that these writs were sued out in the name of an imaginary plaintiff. The question, therefore, is this, whether this name that was used was mere pretence; for I think that if these defendants had any authority from Saunders to use his name, this form of action cannot be supported. The question is not, whether Saunders was a *bonâ fide* holder of this bill; for if he was not the holder of the bill, and these defendants sued out writs in his name by his authority, this action will not lie; but if you think that the defendants sued out the writs without any authority from Saunders, and that the bringing him here is an after-thought, the plaintiff is entitled to recover; because, if these writs were sued out without the authority of Saunders, either express or *implied, they were waste paper, and these costs ought never to have [*104 been paid.

Verdict for the plaintiff. Damages, 6*l.* 1*s.* 6*d.*

Gurney, and Platt, for the plaintiff.

Archbold, for the defendants.

[Attorneys—Cox, and *In person.*]

BEFORE MR. JUSTICE BAYLEY.

(*Who sat for the Lord Chief Justice.*)

HEDGLEY and Wife v. HOLT. Dec. 7.

A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles not necessary for her:—Held, that these advances formed no defence to an action for her wages.

Payments made to an infant, on account of wages due to her, for her to purchase necessaries, are valid payments.

Money paid by a master for coach-fares for the mother of his servant, who was under age, cannot be deducted from the wages of the servant.

The statement of an account by an infant is not binding on the infant

ASSUMPSIT for servant's wages due to the wife before her marriage. Plea—General issue.

The plaintiffs sought to recover a sum of 14*l.* 15*s.* for wages due to the wife, as a servant of all work to the defendant, she being at the time of the service under age and unmarried.

The defence was, that she had received money at various times equal to the amount due to her; but it appeared, that a part of these payments consisted of a sum of 1*l.* 10*s.* paid for a silk dress, and of other sums for a reticule, and for lace for her caps, and various other articles, amounting to 4*l.* 10*s.* more. It was also proved, that 4*l.* 10*s.* had been paid to her, and that she had settled her account with the defendant for wages.

BAYLEY, J. Can that part of the case, which rests on these payments, be sustained? They are not for *necessaries; and the young woman was [*105 under age at the time.

Brougham, for the defendant. I apprehend that, as the money had been paid her in some shape or other for services rendered, and as she, in a settlement of accounts, admitted the payments, this form is a good ground of defence.

BAYLEY, J. No: Payments made on account of wages due to an infant, for necessaries, and which could not be avoided, are valid payments; but an infant cannot bind herself for things which are not necessary; indeed, even the statement of an account does not bind an infant. It appears that this young woman was under age when she settled the account. The consequences might be very injurious, if the law were otherwise. What would it lead to in this very case?

Here is a female, who is described as rather a showy woman, suffered to dress in a manner quite unfitted to her station; and, at the end of her twelve months' servitude, she would not have a farthing in her pocket.

Some payments for coach-fares for the plaintiff and her mother were proved.

BAYLEY, J. The law will not warrant the payments for the mother. They cannot be considered as necessary.

Verdict for the plaintiffs.—Damages, 10*l.* 15*s.*, which was the sum claimed, after deducting some payments which were unobjectionable.

Scarlett, A. G., and *Comyn*, for the plaintiffs.

Brougham, for the defendant.

[Attorneys—*Jones & H.*, and *Ware*.]

*106] *ADJOURNED SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

LACK v. SEWARD. Dec. 11.

If, in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appear that the accident happened from circumstances which persons of competent skill could not guard against; the plaintiff will not be entitled to recover; nor will he, if his men had put his barge in such a place that persons using ordinary care would run against it; nor, if the accident could have been avoided, but for the negligence of the plaintiff's own men in not being on board his barge at a time when it was lying in a dangerous place.

CASE against the defendant, for the negligence of his servant in managing his barge, whereby the plaintiff's barge was run down and sunk. Plea—Not Guilty.

It was opened, on the part of the plaintiff, that his barge was moored to a vessel below London-bridge, and that the servant of the plaintiff, who had charge of the plaintiff's barge, was not on board at the time of the accident.

The plaintiff's servant was called on the part of the plaintiff.

Gurney, for the defendant, objected, that he was not a competent witness, as he was in charge of the plaintiff's barge; and if the accident happened from his neglect, he would be answerable to his master, unless he was released.

LORD TENTERDEN, C. J. He was not on board, and he did nothing. I think he is competent to prove that.

The witness was examined; and he proved, that he had left the barge and was standing on a neighbouring wharf. He was proceeding to state, that he saw the defendant's barge come through London-bridge.

Gurney renewed his objection, as the witness was going expressly to prove that the accident arose from the mismanagement of the defendant's servant, and not from his own neglect.

*107] **Brodrick*, for the plaintiff. The plaintiff will release him.

A release from the plaintiff was executed, and the witness proved the whole case on the part of the plaintiff, except the amount of damages; and he was confirmed by other witnesses as to the want of skill in the defendant's men.

Gurney, for the defendant. If a plaintiff complains of an injury to his vessel, he must show that he was himself not to blame. If the whole was a mere accident, nobody is answerable; and if the accident occurred partly from the neglect of the plaintiff's men, and partly from that of the defendant's, the defendant is not liable. Now, the facts are these: by the regulations of the port of London, only four vessels should lie abreast at the place in question. There were in fact six

vessels there, and the plaintiff's men placed this barge on the outside of them all; and though this was a most dangerous place, none of the plaintiff's men remained on board; for if they had, they might, by changing their own position, have got out of the way of the defendant's barge.

Evidence was given to show that only four vessels ought to lie at the place in question, but that, at the time of the accident, there were six; and that the barge was on the outside of them all. Some of the defendant's witnesses stated, that, if a man had been on board the plaintiff's barge, he might have got her out of the way; but that, from the rapidity of the current, the time for him to have done so would have been excessively short. No distinct evidence was given of the regulations of the port of London.

Lord TENTERDEN, C. J. The plaintiff in this case complains of an injury to his barge through the negligence of the defendant's servants. If the accident happened *from the state of the tide, or from any other circumstance [*108 which persons of competent skill could not guard against, the plaintiff is not entitled to recover; and so, if the plaintiff's men had put this barge in such a place that persons using ordinary care would run against it, the defendant will not be liable. Nor will he be liable if the accident could have been avoided, but for the negligence of the plaintiff's men in not being on board his barge at a time when it was lying in a dangerous place. The only case in which the defendant is answerable, is, if the accident arose from the negligence or want of skill in his own men. The only question, therefore, is, whether you think you can say, that this accident arose from the want of care and caution on the part of the defendant's servants; for, if so, the plaintiff is entitled to recover.

Verdict for the plaintiff.—Damages, 45*l.* 12*s.*

Brodrick, and *Tomlinson*, for the plaintiff.

Gurney, and *Platt*, for the defendant.

[Attorneys—*Harmer*, and *Pontifex*.]

KING, Gent., one, &c., v. SMITH. Dec. 12.

If A. and B., being partners, dissolve their partnership, and in the deed of dissolution it be stipulated that A. shall receive all debts due to the firm, and afterwards C., a debtor of the firm, accept a bill of exchange drawn by B., for the amount of the debt due to the firm:—Held, that this stipulation in the deed of dissolution is no defence to an action by B. against C. on this bill of exchange.

Either partner, after a dissolution of partnership, may receive debts due to the firm, notwithstanding such a stipulation in the deed of dissolution; and, after a dissolution of partnership, either partner may give a release to a debtor of the firm.

ASSUMPSIT by the plaintiff as drawer, against the defendant as the acceptor, of a bill of exchange for 25*l.* Plea—General issue.

The defendant's handwriting was proved, and the defence was, that the bill was accepted without consideration; and, to prove this, it was shown, that the plaintiff and his father, Mr. A. King, had been in partnership, as *attor- [*109 neys and solicitors; and that, while in partnership, they had done business for the defendant to the amount of the bill in question. It was further proved, that, before the date of this bill, the plaintiff and his father had dissolved partnership, and that, by the deed of dissolution (which was put in), it was stipulated, that Mr. A. King should receive all debts due to the firm.

Lord TENTERDEN, C. J. This is no answer to the present action. After a dissolution, either partner may give a release.

Denman, for the defendant. There was no release here.

Lord TENTERDEN, C. J. Nor need there be. Either partner might receive the debt after the dissolution of the partnership, notwithstanding the stipulation in this deed, that the father should receive all the debts; and I am of opinion, that, as the plaintiff might receive the money, he might take a bill for it. As

between the two partners, this deed is binding, and the plaintiff will have to account for this money to his father. We continually see bills in equity to restrain one partner from receiving money due to the firm.

Verdict for the plaintiff.

Hutchinson, for the plaintiff

Denman, and *Comyn*, for the defendant.

[Attorneys—*W. H. King*, and *Guy*.]

*110] *FURTHER ADJOURNED SITTINGS IN LONDON AFTER
MICHAELMAS TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

HANDEY v. HENSON. Jan. 9.

A surgeon and apothecary may, besides his charges for medicine, recover such charges for attendances, as the Jury shall consider to be fair and reasonable.

ASSUMPSIT for medicine and medical attendance on the defendant and his family. Plea—General issue.

The plaintiff, a surgeon and apothecary, had attended the defendant and his family, and had also supplied medicine to them in the year 1827. The plaintiff's bill amounted to 7*l.* 0*s.* 6*d.*; and in it there were charges for the medicine supplied, and also several charges of two shillings and sixpence each for attendances. The charges of the bill were all proved to be fair and reasonable.

LORD TENTERDEN, C. J. (in summing up.) In this case, besides his charges for the medicine, the plaintiff has also charged half a crown each for several attendances, which seems to me to be very moderate; you will consider whether it is too much, and if you think it not too much, you will, by your verdict, give to the plaintiff the sum he claims.

Verdict for the plaintiff—7*l.* 0*s.* 6*d.*, which included the charges for attendances.

Thesiger, for the plaintiff.

Platt for the defendant.

[Attorneys—*D. Willoughby*, and *In person*.]

See the cases of *Allison v. Haydon*, 3 C. & P. 246, and *Towne v. Lady Gresley*, Id. 581.

*111] *DE GRAVE and Another v. The Mayor and Corporation
of MONMOUTH. Jan. 11.

If the Mayor of a town order weights and measures; and, when supplied, they be examined at a full meeting of the corporation—This is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact, that the Mayor was afterwards ousted from his office by a judgment of the Court of King's Bench, makes no difference.

DEBT for the price of weights and measures. Plea—General issue.

This action was brought to recover the value of a quantity of weights and measures of the imperial standard, supplied to the Corporation of Monmouth in the year 1826, on the order of Mr. Jenkins, who was then the Mayor of that borough; but one of the witnesses stated in his cross-examination, that Mr.

Jenkins was afterwards displaced from his office of Mayor by a judgment of ouster in the Court of King's Bench.

J. Williams, for the defendants, objected, that Mr. Jenkins was not Mayor.

Lord TENTERDEN, C. J. He was Mayor *de facto*, which was sufficient to authorize him to order the weights and measures.

The delivery of the goods and the value were proved. It was also proved that the weights and measures were taken out of the boxes in which they were sent to Monmouth, and were examined in the jury-room at a full meeting of the corporation; and that some of the weights and measures in the town market were afterwards regulated by them.

J. Williams. I also submit that this action cannot be maintained, as a corporation cannot contract unless by some instrument under their common seal.

Lord TENTERDEN, C. J. I think that the examination of these weights and measures by the corporation, at the meeting in the jury-room, was exercising an act of *ownership over them; and that, by so doing, the corporation [*112 have recognised the contract.

Verdict for the plaintiffs.

Gurney, and *Comyn*, for the plaintiffs.

J. Williams, and *Jefferys Williams*, for the defendants.

[Attorneys—*Sheppard*, and *J. Williams*.]

As to what acts can be done by a corporation aggregate without an instrument under their common seal; see *Comyn's Digest*, tit. "*Franchises*," F. 12—14, and *Vin. Abr.* tit. "*Corporation*," K; see also the cases of the City of London Gas Light and Coke Company v. *Nicholls*, 2 C. & P. 365; and the Southwark Bridge Company v. *Sills*, *Id.* 371.

DOBSON and Others v. DROOP. Jan. 14.

If A. has goods consigned to him, and there be on board the same ship goods consigned to other consignees, and those goods are so placed on board, that A., after the ship arrives, cannot obtain his goods within the time limited by the bill of lading, A. is not liable for demurrage.

ASSUMPSIT for demurrage. Plea—General issue.

The plaintiffs were the owners of the ship *Mantura*, which had sailed from Bremen to London with corn of various kinds, consigned to the defendant. The plaintiffs claimed fourteen days' demurrage. A bill of lading was put in, at the bottom of which was written—"The ship to be discharged in fourteen running days, or 5*l.* a day demurrage."

The ship arrived on the 6th of January, 1829, but some of the defendant's corn remained on board till the 3d of February.

The captain stated, in his cross-examination, that his cargo was made up of consignments to five different consignees.

The defence was, that the reason why any of the defendant's corn remained on board after the expiration of the fourteen running days, was, that the defendant could not take it away, because the goods consigned to one of the other consignees were so placed as to prevent him; and it *was argued by [*113 *Scarlett*, A. G., for the defendant, that the defendant ought not to be charged with demurrage, as he was in no way culpable; and that, if demurrage was paid by all the five consignees, it would exceed the freight. He cited *Leer v. Yates*, 3 Taunt. 387, and *Rogers v. Hunter*, 2 C. & P. 601.

Lord TENTERDEN, C. J., (in summing up). I am of opinion, that, if a party cannot get his goods, he being prevented by a delay on the part of the owner of other goods on board the same vessel, he is not liable for demurrage. The question here is, whether the removal of the defendant's goods was obstructed by the misconduct of another, in not removing his goods; for, if so, the defendant is not liable for demurrage; but, if you should think, that the goods

consigned to the defendant were suffered by him to remain on board after the time stipulated for, you ought to find for the plaintiffs.(a)

Verdict for the plaintiffs.

F. Pollock and Alderson, for the plaintiffs.

Scarlett, A. G., and Richmond, for the defendant.

[Attorneys—*Robinson, and Freshfield & Son.*]

(a) See the case of *Harman v. Clark*, 4 Camp. 159; and as to the law respecting demurrage, see *Abbott on Shipping*, p. 182, *et seq.*

ISAAC v. IMPEY, Esq., and Others. Jan. 19.

Commissioners of bankrupt committed a witness for refusing to read the entries in an account :—Held, that they were liable to an action for false imprisonment for so doing, because this was not a question:—Held, also, that the circumstance of the witness speaking of it as a question at the time of his refusal made no difference.

FALSE imprisonment. The *first* count of the declaration was for an imprisonment for twenty-four hours; and *the *second* count was for an imprisonment for fourteen days in Newgate. Pleas—*First*, Not guilty; *Second*, A justification by the defendants as commissioners of bankrupt, stating in effect that they committed the plaintiff for not answering.(a) Replication—*De injuria.*

(a) As a plea of justification by commissioners of bankrupt is not to be found in any of the printed collections, the form of it may be acceptable. The defendants, being commissioners of bankrupt, might, under section 44 of the Bankrupt Act, 6 Geo. 4, c. 16, have pleaded the general issue, and have given special matter in evidence, or they might have pleaded their justification without any other plea, as was done in the case of *Cotton v. James*, 3 C. & P., 505, and so have got the right to begin, with the chance of the reply.

Plea.—This plea was to both counts of the declaration; it stated the trading of the bankrupt Owen; the petitioning creditor's debt; the act of bankruptcy, and the commission, nearly in the way as they are stated in the plea in the case of *Cotton v. James*, 3 C. & P. 506, and then proceeded as follows:—

“And that the said defendants, before they proceeded to act as commissioners under the said commission (except in administering the several oaths next hereinafter mentioned), and before the adjudication of bankruptcy, and the several summonses to, and examinations of, the said plaintiff hereinafter mentioned, and before the said time when, &c., in the said first count mentioned, to wit, on the 21st June, in the year aforesaid, at London, did administer to each other, and did severally, and in the presence of each other, take the oath prescribed and appointed, by the said statute concerning bankrupts, to be taken by every commissioner before he shall act in the execution of any of the powers and authorities given by the said last-mentioned statute (except as last aforesaid). And that the said defendants did then and there enter and keep a memorial thereof, signed by the said defendants respectively, among the proceedings under the said commission.” It then stated, that Mr. Grant, another commissioner, took the oath, and proceeded as follows: “And that afterwards, and before the several times of the summonses to and examinations of the said plaintiff hereinafter mentioned, and before the said time when, &c., in the said first count mentioned, to wit, on the said 21st day of June, in the year aforesaid, at London aforesaid, they did find that the said Samuel Owen had become bankrupt within the true intent and meaning of the said statute concerning bankrupts, before the date and issuing forth of the said commission, and did then and there declare and adjudge him bankrupt accordingly. And that, after the said defendants had so adjudged the said Samuel Owen, bankrupt, as aforesaid, to wit, on the 22d day of June, in the year aforesaid, they did cause notice of such adjudication to be given in the London Gazette, and did thereby appoint three public meetings for the said bankrupt to surrender and conform, pursuant to the provisions of the said statute concerning bankrupts. That, after the said adjudication, the said plaintiff, being a person then and there believed by the major part of the commissioners named in the said commission, capable of giving information concerning the person, trade, dealings, or estate of the said bankrupt, was duly summoned to appear; and afterwards, before the said time when, &c., in the said first count mentioned, to wit, on the 10th day of January, 1828, at London aforesaid, did appear before the said Archibald Elijah Impey, William Villiers Surtees, and Robert Grant, as such commissioners as aforesaid; and the said plaintiff being then and there present before the said Archibald Elijah Impey, William Villiers Surtees, and Robert Grant, and being then and there duly sworn and examined by the said Archibald Elijah Impey, William Villiers Surtees, and Robert Grant, did, upon his oath, to the several questions propounded to him as follows (the same being then and there respectively lawful questions), give the several answers thereto respectively subjoined, that is to say:—

“Q.—What are you?

*It was opened, on the part of the plaintiff, that a person named Owen had become bankrupt, and that the *defendants were the commissioners of bankrupt who acted under the commission against Owen; and that the defendants, *supposing that there had been some usurious transac-

"A.—I am a merchant.

"Q.—Do you know the bankrupt Owen, and if you do, how long have you known him?" &c. (It here set out the whole of the first examination, *verbatim*, in question and answer.) The plea then proceeded as follows—

"And the said several questions and answers last mentioned, being then and there reduced into writing, were then and there signed by the said plaintiff, to wit, at London, &c. And that the said plaintiff, having been again duly summoned to appear, afterwards, to wit, on the 18th day of January, 1828, did appear before the said Archibald Elijah Impey, William Villiers Surtees, and Robert Grant, as such commissioners as aforesaid, and was then and there again duly sworn and examined by the said Archibald Elijah Impey, William Villiers Surtees, and Robert Grant, and, upon his oath, to the several questions then and there propounded to him as follows (the same being then and there respectively lawful questions), then and there, upon his oath, gave the several answers thereto respectively subjoined (that is to say):"—The plea then set forth several other examinations *verbatim*, commencing each with a statement of the summons, and concluding with an allegation of the plaintiff signing the examination, till it came to the examination at which the plaintiff was committed, and that concluded as follows:—

"Q.—Refer to Ledger G., and the account in it headed Russian stock.

"A.—I have now referred to it.

"Q.—You are now requested to read all the entries contained in that account.

"And the said defendants say, that the said last-mentioned question was then and there objected to by counsel for the said plaintiff; but the said defendants then and there overruled such objection.

"A.—Acting under the advice of my counsel, I demur to answer the question, inasmuch that the matters in that account are not relating to the bankrupt Owen. It is, therefore, I submit, with the advice of my counsel, that I am not bound to read the entry; and I request the commissioners to allow me to consult my counsel on the propriety of the question put, so that I may give a proper and legal answer to it; but in case the commissioners refuse, I request that the counsel may be allowed to enter for me such proper protest as he may see necessary. When I say that I demur to answer the question, I mean to say, that I refuse to comply with the request to read the entries contained in the account alluded to.

"And the said defendants say that the said plaintiff having so refused to answer the said last-mentioned question, they the said defendants, afterwards, to wit, at the said time when, &c., in the said first count of the said declaration mentioned, at London, &c., directed one Henry Page, their messenger in that behalf, to take the said plaintiff into his custody, there to remain for safe custody for a reasonable time in that behalf, until a proper warrant in writing should be prepared and signed and sealed by the said defendants, for committing the said plaintiff to his Majesty's prison of Newgate, there to remain without bail, until he, the said plaintiff, should submit himself to them, the said defendants, and full answer make to their satisfaction to the said question so put to him by them as last aforesaid. Whereupon the said Henry Page, by such command of the said defendants, afterwards, to wit, at the said time when, &c., in the first count mentioned, gently laid his hands upon the said plaintiff for the purpose of taking him into custody, and did then and there take him into custody, and kept and detained him in custody for the said space of time in the said first count of the said declaration mentioned (the same being then and there a reasonable and necessary space of time in that behalf); and in so doing, they, the said defendants, committed the said several supposed trespasses in the said first count of the said declaration mentioned, as it was lawful for them to do for the cause aforesaid. And the said defendants say, that, at the expiration of the said reasonable space of time in that behalf, to wit, on the day and year in the said second count of the said declaration mentioned, at London, &c., the said warrant in writing was prepared, and was signed and sealed by the said defendants respectively; which said warrant in writing bore date a certain day and year therein in that behalf mentioned, to wit, the day and year last aforesaid, and was directed to the said Henry Page, their messenger, or to his assistant, and to John Wontner, keeper of his Majesty's prison of Newgate, or to his deputy there; by which said warrant, after reciting the said commission of bankrupt, the said adjudication, and that the said plaintiff was a person believed, as hereinbefore mentioned, capable of giving information concerning the trade, person, dealing, or estate of the said bankrupt, and also reciting the several summonses to, and examinations of, the said plaintiff hereinbefore mentioned; and after specifying in the said warrant the several questions, answers, and demurrers hereinbefore mentioned, according to the said statute concerning bankrupts, and that the said plaintiff having refused to answer the last question hereinbefore mentioned, they, the said defendants, did, by their said warrant, will, authorize and require the said Henry Page or his assistant, immediately upon the receipt thereof, to take into his custody the body of the said plaintiff and him safely to convey to his Majesty's prison of Newgate, and him there to deliver to the keeper of the said prison: who was thereby required and authorized, by virtue of the commission and statute aforesaid, to receive the said plaintiff into his custody, and him safely to keep and detain without bail or mainprize, until such time as he should submit himself to them, the said defendants, the said commissioners, or the major part of the commissioners, by the said commission named and authorized, and full answer make to the said defendants, or to their satisfaction, to the question so put to him by the said defendants as last aforesaid; which said warrant afterwards, and on the expiration of the reasonable time aforesaid, and before the said time when, &c., in the said second count of the said declaration mentioned, to wit, on the day

*118] tions between the plaintiff, a person named Leon, and Owen, *had sent for and examined the plaintiff several times; and that they had ultimately committed him for not answering the following—

Q. You are now requested to read all the entries contained in that account.

A. Acting under the advice of my counsel, I demur to answer the question, inasmuch that the matters in that account are not relating to the bankrupt Owen; it is, therefore, I submit, with the advice of my counsel, that I am not bound to read the entry; and I request the commissioners to allow me to consult my counsel on the propriety of the question put, so that I may give a proper and legal answer to it; but in case the commissioners refuse, I request that the counsel may be allowed to enter for me such proper protest as he may see necessary. When I say, that I demur to answer the question, I mean to say, that I refuse to comply with the request to read the entries contained in the account alluded to."

It further appeared, that, as it was necessary to set out the whole of the plaintiff's examination (which had lasted several days) in the warrant, the defendants had ordered the messenger to take the plaintiff into custody and detain him till a proper warrant could be made out. This was done, and this was the imprisonment complained of in the first count of the declaration. The warrant was not made out till the next day; and under the warrant the defendant was committed to Newgate, and there detained for fourteen days, when the plaintiff *119] was brought up by **habeas corpus*, and discharged by the Court of Exchequer.(a)

It was proved that the plaintiff was put to an expense of 86*l.* 2*s.* 4*d.* in obtaining his discharge; and, it was also proved that he was first detained in custody of the messenger,(b) and afterwards in Newgate; and that notice of action was duly served on the defendants.(c)

The warrant was read.

F. Pollock, for the defendants. Perhaps this case resolves itself into a question of law. On the face of this warrant, it is clear that the defendants acted as a Court. In the Court of Exchequer, the case went off on the ground, that no question was put by the commissioners, and that what they committed the plaintiff for refusing to answer, was not a question. Now, it is clear, that there was, in effect, a question put by them. It is not necessary that any particular form of words should be used. It is sufficient, if the information is conveyed to the mind of the party.

Lord TENTERDEN, O J. I am clearly of opinion, that, if no question is put, the commissioners cannot commit as for not answering a lawful question. This is not a question, either in form or substance. The commissioners are not properly a Court, where they act otherwise than the act of parliament warrants; *120] and the act expressly protects *the commissioners by one of its sections,

and year last aforesaid, at London, &c., was delivered to the said Henry Page to be executed in due form of law. And the said Henry Page afterwards, and immediately upon the said warrant being so delivered to him as aforesaid, to wit, at the said time when, &c., in the said second count of the said declaration mentioned, again gently laid his hands upon the said plaintiff, for the purpose of conveying, and did then and there convey, him in custody under the said warrant to his Majesty's prison of Newgate, and then and there delivered him to the said John Wontner, who was then and there keeper of his Majesty's prison; and he, the said John Wontner, did then and there receive the said plaintiff into his custody, and kept and detained him in custody in the said prison, by virtue of the said warrant, for the said space of time in the second count of the said declaration mentioned. And in so doing they, the said defendants, committed the said several supposed trespasses in the said second count of the said declaration mentioned, as it was lawful for them to do, for the cause last aforesaid. And this they, the said defendants, are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

(Signed)

JOHN PATERSON.

(a) For the arguments in that Court, and the judgments of the learned Barons, see 3 Younge & Jervis, 38.

(b) If the warrant had been good in point of law, it would then have become an important question, whether commissioners of bankrupt have a right to commit a witness to the custody of the messenger, while the warrant of commitment is making out; however, as in this case the warrant was held bad, the whole imprisonment was illegal, and this question did not arise.

(c) This is required by sect. 41 and 42 of the Bankrupt Act, 6 Geo. 4, c. 16.

as it is made necessary to give the commissioners notice before any action can be brought against them, which you never find as to Courts, properly so called.

F. Pollock addressed the Jury in mitigation of damages.

Lord TENTERDEN, C. J. (in summing up.) These defendants have pleaded a justification as commissioners of bankrupt, acting under a commission which had issued against a person named Owen. The defendants certainly have mistaken their power, but I see no evidence which attributes to them any motive other than a wish to discharge their duty. They profess to commit this plaintiff for a refusal to answer a question, but they put no question; and having committed him under circumstances which the act of parliament does not warrant, they are answerable in this action. The plaintiff has been in prison fourteen days, and has incurred an expense of nearly 90*l*. You will, therefore, take the case into your consideration, and let your verdict be the result of calm deliberation.

Verdict for the plaintiff.—Damages, 250*l*.

Scarlett, A. G., and *Alderson*, for the plaintiff.

F. Pollock and *Patteson*, for the defendants.

[Attorneys—*Clare & Co.*, and *Sweet & Carr.*]

IN the ensuing term, *F. Pollock* moved for a rule to show cause why there should not be a new trial.

Lord TENTERDEN, C. J. The authority of commissioners of bankrupt to commit depends upon a particular act of parliament; and they have power to commit for refusing to answer lawful questions, and for refusing to produce books, &c. It does not appear on the face of this warrant, that any of these offences was committed by the plaintiff. As to whether this is a question or not, I think it is impossible for any man of common sense or understanding to believe, that, ordering a person to read an entry, is a question.

BAYLEY, J. It seems to me impossible to consider the words used as a question.

Rule refused. (a)

(a) The power of commissioners of bankrupt to summon witnesses, and commit them for refusing to answer, &c., is given by sect. 33 and 34 of the Bankrupt Act, 6 Geo. 4, c. 16. The mode of proceeding against commissioners of bankrupt, with respect to the notice of action, suing out the writ, &c., is regulated by the sections from 40 to 44 of that act.

DUCARRY v. GILL. Jan. 2.

If A. authorize B. to draw bills upon him, and B. do so, A. is not liable to be sued as the drawer of those bills.

By a resolution of the directors of a mining company, four directors were necessary for the doing of any act. Three of the directors were called trustees, and those three gave a power of attorney, to the agent of the company to draw bills:—Held, that the other directors were not liable on those bills, as the power of attorney was not executed by four directors.

ASSUMPSIT by the plaintiff as endorsee, against the defendant as drawer, of three bills of exchange. There were also the common money counts.

The bills were all in the following form:

“Coquimbo, 17th February, 1826.

“Sixty days after sight, pay this our first of exchange (second and third not paid), to Mr. John Le Roi, or order, the sum of 891*l*. 18*s*. 4*d*., sterling, and place the same to the account of the trustees of the Chilian and Peruvian Mining Association.

“Messrs. Spooner, Attwood, & Co. }
Bankers, London.” }

*These bills were all signed by Captain Andrews, and Captain Bagnold, in their own names. [122

It appeared that the defendant was a director of the Chilian and Peruvian Mining Association; and that, by a resolution of the directors, four directors were to constitute a board. It also appeared, that Mr. Alderman Thompson, Mr. Attwood, and Mr. Hamlet, were trustees of the Company, they being also directors; and that Captains Andrews and Bagnold were agents of the Company in South America. And a power of attorney executed by the three trustees to Captains Andrews and Bagnold, was put in; it was dated, August 1st, 1826; and by it, the trustees, for themselves and the other directors, authorized Captains Andrews and Bagnold to employ engineers, and to draw bills on Messrs. Spooner, Attwood, & Co., &c. It was proved by Captain Bagnold, that he, being at Coquimbo, wanted money for the purposes of the Company, and obtained it from the agent of the plaintiff at that place, giving him the bills in question.

Scarlett, A. G., for the defendant. I submit that the plaintiff has no right to recover against this defendant. There was a resolution of the directors, that a quorum of four should be necessary. Now, this power of attorney is granted by the three trustees only. The bills too are drawn on account of the trustees only; and there is no proof that the directors ever gave any power or authority to the agents to draw bills.

Campbell, for the plaintiff. Upon these bills my friend admits the three trustees to be liable; and I say, that all the directors are likewise. This is not an action upon a deed executed by an attorney under a power of attorney. There, I admit, that those only who executed the power of attorney could be sued upon the deed, but, with respect to bills, the agents might even have been *123] authorized by parol. In this power of attorney, the trustees give authority to the agents for themselves and the other directors.

Scarlett, A. G. This declaration states the defendant to be the drawer of these bills; it does not state them to be drawn by Captain Andrews and Bagnold; and I do not concede that a man, by giving authority to another to draw bills, thereby makes himself the drawer of those bills. If a person allows his factor to draw upon him, and he agrees to accept, he is not liable as drawer; and where a person draws *per* procuration, he puts the other person's name, and shows who is the drawer.

Lord TENTERDEN, C. J. I am of opinion, that the plaintiffs cannot recover on these bills. There are two objections: *First*, supposing that I authorize my agent to draw bills on me, and he does so, I am not the drawer of those bills; and, *secondly*, to make this power of attorney binding on the defendant, as a director, four directors should have joined in the making of it; whereas it is only executed by the three trustees.

The plaintiff's counsel then went on the count for money lent, and obtained a verdict on that count.

Campbell and *Richmond*, for the plaintiff.

Scarlett A. G., and *Follett*, for the defendant.

[Attorneys—*Freshfield & Son*, and *Fox*.]

In the ensuing Term, the Court granted a rule to show cause why there should not be a new trial, on the ground that the plaintiff was not entitled to recover against the present defendant on the count for money lent.

*124] *NEWELL and Another v. JONES. Jan. 22.

If a party show, in an action for money lent, that it was the course of dealing between him and the defendant, to calculate the interest every year, and add that to the principal, and the next year to calculate upon the total, he may recover interest, calculated in same way, for the years subsequent to the striking of the last balance between the parties.

ASSUMPSIT for money lent, and upon an account stated.

On the part of the plaintiffs, accounts were put in, showing, that, from the year 1824 to the year 1827, the plaintiffs and defendant balanced their account of principal and interest every year; and that the interest, at the end of each year, was added to the principal, and at the end of the following year interest was calculated upon the principal and interest of the former year.

Kelly, for the defendant. The question is, whether the plaintiffs are entitled to more than 5*l. per cent.* interest on the last balance of these accounts?

Lord TENTERDEN, C. J. Unless you can alter these documents my opinion is formed.

Kelly. There cannot be interest upon interest without an express agreement; and if there was an agreement, I submit that it would be illegal, as an agreement for compound interest. I believe that question has been raised in equity, but not decided.

Brodrick, for the plaintiffs, cited *Bruce v. Hunter*. (a)

Lord TENTERDEN, C. J. These different accounts show, that the course of dealing was, that interest should be calculated every year, and that that sum should be *carried on to the next year; I am of opinion, that these plaintiffs are entitled to recover. I recollect, in a case before Lord Kenyon, [*125 that where interest had been calculated every year, and carried on to the next year, it was held to be evidence to show a course of dealing.

Verdict for the plaintiffs for the whole sum claimed.

Brodrick, for the plaintiffs.

Kelly, for the defendants.

[Attorneys—*Hicks & B Cranch*.]

(a) 3 Camp. 467. In that case, it was held, that an agent who had advanced money for his principal in effecting insurances and other mercantile business, was held to be entitled to charge interest; and at the end of every year, to make a rest, and add the interest then due to the principal, it being shown that the parties had so calculated interest in previous accounts.

*OXFORD SUMMER COURT, 1829.

[*126

BEFORE MR. BARON VAUGHAN. (a)

BERKSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

SMITH, Administratrix of SMITH, Gent., one, &c. v. FORTY. July 29.

An administratrix sued for a debt due to the intestate. It appeared that the debt accrued more than six years before the commencement of the action; but that, within six years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could.—Held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the statute of limitations was no bar.

ASSUMPSIT, for business done by the intestate, as an attorney. The declaration contained a count upon an *account stated with the administratrix. [*127
Pleas—*First*, General issue; *Second*, The statute of limitations.

(a) Mr. Baron Hullock came to Abingdon as senior Judge of assize, on Saturday, the 25th of July, and died there on the Friday following.—At Abingdon, Oxford, Worcester, and Stamford, Mr. Jervis, Mr. Serjeant Peake, and Mr. Serjeant Ludlow, sat in his stead; and at Shrewsbury, Mr. Serjeant Taddy joined the circuit, and continued to try till the end of the cir-

All the business had been done more than six years before the commencement of the action, except the writing of a letter, for which 3s. 4d. was charged.

It appeared that Mr. Smith had died in the year 1825; and that, in the year 1826, Mr. Moore, who had been his clerk, was employed by the administratrix to get in the debts, and that the defendant, in consequence, called on him. It further appeared, that the defendant and Mr. Moore went through the account together; and that, after allowing some deductions, which were claimed by the defendant, they struck a balance of 40*l.* 5*s.* 5*d.* in favour of the administratrix. Mr. Moore made a memorandum of this amount on a piece of paper, and the defendant said, "I hope Mrs. Smith will not press me for the money, for I will pay her as soon as I can, with interest."

Jervis and *Talfourd*, for the defendant, objected, that this would not take the case out of the statute of limitations, since the stat. 9 Geo. 4, c. 14, as there was no promise or acknowledgment in writing. (a)

Mr. Baron VAUGHAN. I think that the plaintiff has shown a good cause of action on the count upon an account stated with the administratrix. The plaintiff does not go upon the original debt at all. I take the statute 9 Geo. 4, c. 14, to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the statute *128] of limitations, that the debt has been satisfied in the course of six years since it occurred.

Verdict for the plaintiff.—Damages, 40*l.* 5*s.* 5*d.*

Cross and *Justice*, for the plaintiff.

Jervis and *Talfourd*, for the defendant.

[Attorneys—*Moggridge*, and *Melvin*.]

cuit. Mr. Serjeant Taddy's name was not originally in the commissions, but they were sent to London for the purpose of having it inserted. After the arrival of Mr. Serjeant Taddy, Mr. Baron Vaughan sat as senior Judge presiding at Nisi Prius at Hereford and Gloucester, and on the crown side at Shrewsbury and Monmouth; though before Mr. Baron Hullock's death, his Lordship was the junior Judge of the circuit. When the senior Judge of the circuit is prevented from attending by indisposition, and a learned Serjeant goes the circuit for him, the Serjeant presides at Nisi Prius at those towns where the senior Judge would so preside.

(a) That stat. will be found, 3 C. & P. 298, (d).

WORCESTER ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. JOHN HUNTER. Aug. 5.

On an indictment for uttering a forged deed, it appeared that the deed alleged to have been forged was produced in evidence by the prisoner's attorney on the trial of an ejectment, in which the prisoner was lessor of the plaintiff; and that, after the trial, it was returned to the prisoner's attorney.—Held, that if the prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling his attorney to prove what he had done with the deed.

If, as secondary evidence of the contents of the deed, the draft be given in evidence, and in the draft words be abbreviated, which, in the setting out of the deed in the indictment, are put in words at length, it will be for the Jury to say, whether they think that the words abbreviated in the draft were inserted at length in the deed itself.

INDICTMENT for uttering a forged deed, knowing it to have been forged. (a) In some of the counts of the indictment it was charged, that certain parties made a deed of demise, and that the prisoner fraudulently altered it; and in these counts the deed was set out; in the other counts, the deed was described, and only that part set out in which the forgery was alleged to have been committed.

(a) See 3 C. & P. 591.

On the part of the prosecution, an examined copy of the *postea* of an ejectment, Doe on the demise of Hunter v. Champkin, was put in, and a witness proved, that, on the trial of that ejectment, the deed alleged to have been fraudulently altered was produced by the attorney of Mr. Hunter, and returned to him after the trial was over. Evidence was also given, that Mr. Hunter had notice to produce it on the present trial. The counsel for the prosecution called upon Mr. Hunter to produce the deed, and as his counsel refused to do so, they wished to give secondary evidence of its contents.

Taunton, Russell, Serjt., and C. Phillips, objected that this was no sufficient proof that the deed was in Mr. Hunter's possession; and that his attorney in the ejectment case should be called to trace it into his possession.

Mr. Baron VAUGHAN. If the prisoner's attorney produced this deed as part of the evidence of his client's title on the trial of the ejectment, and it be delivered back to his attorney when the trial is over, I shall hold that it is in the prisoner's possession; and if he does not produce it, I shall receive secondary evidence of its contents.^(a)

The prisoner's counsel objected, that, previously to the reception of secondary evidence of this deed, it was incumbent on the prosecutor to prove that the deed was duly executed, which must be done by calling the subscribing witness, the indictment not charging that the entire deed was a forgery, but alleging that the deed was a true deed, and that the prisoner had feloniously altered it.

*Mr. Baron VAUGHAN. I shall receive the evidence. I certainly shall not stop the case upon this objection.

The draft of the deed was then produced by Mr. Birch, the attorney in whose office it had been prepared. The draft was put in and read. In the description of the parties one of them was described in the draft as "a Captain in the Oxon. Militia." In the setting out of this part of the deed, in those counts of the indictment in which the deed was set out, it was put "a Captain in the Oxford Militia."

The prisoner's counsel objected that this was a fatal variance, as these counts of the indictment professed to set out the tenor of the deed.

Mr. Baron VAUGHAN. Without considering whether the putting Oxford for Oxon. is or is not a variance, I think that there is nothing in this objection. The indictment does not profess to set forth the tenor of the draft. It professes to set forth the tenor of the deed itself. And this draft is put in with a view of showing the Jury what the deed itself contained. It will be for them to say whether this word "Oxon." in the draft, would be put "Oxford" in the deed, in the same way that the words "exors. and admors." in the draft would be put "executors and administrators" in the deed.

The whole of the evidence for the prosecution was gone through, and Mr. Hunter was acquitted on the merits.

Campbell, Ludlow, Serjt., Curwood, and Godson, for the prosecution.

Taunton, Russell, Serjt., and C. Phillips, for the defence.

[Attorneys—*E. W. & C. Oldaker, and Freeman.*]

(a) In the case of *Rex v. Dixon*, 3 Burr. 1687, Mr. Dixon, who was the attorney of a person named Peach, had produced papers before a master in Chancery, which were returned to him. He was afterwards served with a *subpoena duces tecum*, to produce those papers before the Grand Jury, on a prosecution against Peach for forgery; Mr. Dixon refused to produce them, and the Court said, that Mr. Dixon, instead of producing these papers again at his client's ought, immediately on receiving the *subpoena*, to have delivered them up to his client.

*181]

*GLOUCESTER ASSIZES.

BEFORE MR. SERJEANT TADDY.

REX v. GEORGE BROOKS. Aug. 29.

If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, and a party come in the night and steal them out of these boxes, this is a larceny.

INDICTMENT for a misdemeanor, in attempting to steal pigeons.

It appeared that the prosecutor had wooden boxes hung on the outside of his house, in which pigeons were kept. These boxes had holes in the front, out of which the pigeons could fly when they chose: however, it was proved, that they always roosted there at night, but that they were not confined there in any way. It was also proved, that, on the night in question, the prisoner had reared a ladder against the house, and had got his hand into one of the boxes, for the purpose of taking the pigeons that were in it.

Phillpotts, for the prisoner, objected, that pigeons were not the subject of larceny, unless they were confined; and that the taking of them was only punishable on a conviction before a Justice of the Peace, under the statute 7 & 8 Geo. 4, c. 29, s. 33.(a)

Mr. Serjeant TADDY. If these pigeons were so far tame that they came home every night to roost in these boxes, after they had been out to feed, I shall hold them to be reclaimed, so as to be the subject of larceny. I *182] *know that pigeons being accustomed to pitch on a man's field, would not be sufficient.(b)

Verdict—Guilty.

Justice, for the prosecution.

Phillpotts, for the defence.

(a) By which it is enacted, "That if any person shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds."

(b) In 1 Curw. Hawk. p. 149, it is said, that "it seems clear that a man cannot commit a felony by taking deer, hares, or conies, in a forest, chase, or warren, or old pigeons being out of the house; but it is agreed, that one may commit larceny in taking such or any other creatures *fera natura*, if they be fit for food, and reduced to tameness, and known by him to be so; and it seems the most plausible opinion, that it is felony to steal wild pigeons in a dove-house shut up, hares or deer in a house, or even in a park, enclosed in such a manner that the owner may take them whenever he pleases, without the least danger of their escaping, in which case they are as much in his power as fish in a pond, young pigeons or hawks in a nest, &c., in taking of which, for the like reason, it seems to be agreed that felony may be committed."

In Bac. Ab. tit. "Executor," H. 3, it is laid down, that "Doves in a dove-house descend, together with the house, to the heir, but the young ones that are not able to fly out belong to the executor; however, it seems that this rule could hardly apply to boxes merely hung on to the outside of another building. Probably, such of the doves as would descend to the heir would not be considered the subject of larceny, upon the same principle that the stealing of charters, and even the box that contained them was no larceny at common law.

REX v. JAMES WALKLEY and GEORGE WALKLEY. Aug. 31.

A. and B. were indicted: A. for stealing six bank notes of 100*l.* each, and B. for receiving "the said notes," knowing them to have been stolen. A. stole the six 100*l.* notes, and got them changed into 20*l.* notes, some of which B. received. Held, that B. could not be convicted on this indictment.

THE two prisoners, who were father and son, were indicted, the former for stealing six promissory notes of 100*l.* each, and which he got changed into 20*l.*

notes at different country banks; and the latter for receiving them. The only evidence against the younger prisoner, George Walkley, was, that, at one time, he showed a number of 20*l.* notes, which he said were part of the prosecutor's money; and that, at another time, he threw down a sovereign, *saying, [*133 "I had a hundred sovereigns of the captain's money, and this is one of them."

C. Phillips and *Watson*, objected, that the prisoner, George Walkley, could not be convicted. He was charged with receiving "the said promissory notes;" which clearly meant the notes of 100*l.* each; whereas, it was shown that he never received any 100*l.* note, but only a part of the proceeds of some of them.

Curwood and *Chichester*, *contrâ*, observed, that receiving the stolen property in an altered state was as much an offence, as if the property had remained in the same state.

Mr. Serjeant TADDY. If the prisoner, George Walkley, never received either of these 100*l.* notes into his possession, he must be acquitted upon this indictment. He is not here charged with receiving the proceeds, this indictment imputes that he received "the said promissory notes." Now, the only notes mentioned in the indictment are the notes of 100*l.* each.

The Jury found the prisoner, James Walkley, Guilty; and the prisoner, George Walkley, Not Guilty.

Curwood and *Chichester*, for the prosecution.

C. Phillips and *Watson*, for the defence.

[Attorneys—*Bloxame & Co.*, and *Crook*.]

In the case of *Rex v. Cowell and Green*, 2 Ea. P. C. 617, the two prisoners, Cowell and Green, were convicted upon an indictment, charging that Cowell feloniously stole one live ewe sheep, the goods, &c. of J. L., and that Green received "twenty pounds of mutton, part of the goods," &c., so as aforesaid feloniously stolen, &c., knowing the same to have been stolen. On a question referred to the Judges, whether the indictment was sufficient against the accessory, they all held the conviction proper. It would have been more correct to have stated the receiving to have been of twenty pounds weight of mutton.

BEFORE MR. BARON VAUGHAN.

*DAVIS v. CAPPER, Esq. Aug. 31.

[*134]

On charges of felony, a magistrate has a power to commit for re-examination for a reasonable time. What is a reasonable time, will greatly depend upon the circumstances of each case—fifteen days is an unreasonable time, unless there be circumstances to account for it, and those circumstances it will be incumbent on the magistrate to show.

The fact, that a letter addressed to the prisoner (but which was intercepted, and never was in the hands of the prisoner), mentioned the prisoner as a *particeps* in the felony, and stated, that the writer of it would write again in a fortnight, is not sufficient to warrant such a commitment.

The question of reasonable time is a mixed question of law and fact. It will be for the Jury to say what the facts are, but the Judge will direct them upon those facts, whether the time was reasonable or not, as matter of law.

If a magistrate commits a party till a certain day for re-examination, it is his bounden duty to be in attendance on that day, to take the further examination, and to discharge the party, if there be not evidence sufficient to warrant a further commitment. If a party is committed for further examination for an unreasonable time, his remedy is by action of trespass against the committing magistrate.

If a magistrate commits a prisoner for fifteen days, for further examination, to make the prisoner tell who wrote a letter which was addressed to the prisoner, but which was intercepted, and never was in the hands of the prisoner, such commitment will be illegal.

TRESPASS against the defendant, a magistrate of the county of Gloucester, for falsely imprisoning the plaintiff for fifteen days. Plea—General issue. (a)

(a) This was a second trial of this case. On the argument for a new trial, in Easter Term,

*135] *The defendant was a magistrate for the county of Gloucester, residing at Cheltenham; and it appeared, that, in the month of October, 1827, the plaintiff, Mary Davis, who was lodging in the house of a person named Ann Hamerton, at Cheltenham, received a remittance of a 10*l.* note; and that, soon after this, the plaintiff had a trunk, containing this 10*l.* note, and also a scarf and a pair of gloves, and many other articles of wearing apparel, stolen. It also appeared, that, early in the month of January, 1828, the plaintiff discovered the scarf and gloves in the possession of Ann Hamerton, against whom the defendant issued a warrant. The scarf and gloves were produced before the defendant, and identified by the plaintiff, who made a deposition before the defendant on the 5th of January, 1829, that the goods were *136] hers, and had been feloniously stolen. The defendant adjourned the investigation to the 8th of January, permitting Ann Hamerton to go at large. Between the 5th and the 8th, Ann Hamerton had an interview with the defendant, at his house, and, on the 8th, the case was dismissed, it appearing that the plaintiff had been to consult a conjuror to get information as to who had robbed her. On the 28th of January, Ann Hamerton went before the defendant, and made a deposition, that a number of articles had been stolen from her, and that she had "good cause to suspect" that these articles had been stolen by the plaintiff; and Ann Hamerton gave into the hands of the police officer, a letter, produced before the defendant, signed "Obadiah;" which letter, Ann Hamerton stated that she had received from the postman, who had delivered it at her house, while the plaintiff was at church. This letter bore the Cheltenham post-mark, and was addressed to the plaintiff, but it never reached her hands. There was much reason to suppose that it had been written by Ann Hamerton herself, though of this the defendant appeared to have entertained no suspicion. The letter intimated that Ann Hamerton's goods had been stolen by the plaintiff, and the writer of it suggested that the goods should be returned to her. The letter also contained this postscript:—"If you wish, fur fear of suspicion, not to writ again directly, i will wait for a fortnight, but i must have nonee." Upon this, the defendant committed the plaintiff for further examination, till the 12th of February following, that being a period of fifteen days. The keeper of the prison had the letter signed "Obadiah," delivered to him at

1829, Mr. Justice Bayley said, "The authorities go strongly to show, that a magistrate cannot arbitrarily commit for so long a period as fourteen days, for re-examination. You cannot, I think, lay down any precise rule; but the length of time for which he ought to commit must be governed by circumstances. It must be for a reasonable time, and what is a reasonable time is, in each case, a mixed question of law and fact. The Jury will, if an action is brought against the magistrate, have to say what were the facts, and the Judge will say, upon those facts, whether the time was reasonable. What is reasonable, does not rest upon the discretion of the magistrate; there may be cases in which three days might not be a reasonable time, and yet there might be cases where three months might be reasonable. It must depend on the probability of obtaining further evidence. If a material witness had gone on a voyage, the commitment might be for a longer time than if all the witnesses were on the spot." And Mr. Justice J. Parke, observed, that if a magistrate committed for re-examination, for the purpose of obtaining a confession from the accused, he would be a trespasser. And his Lordship also observed that if the judgment of the magistrate was conclusive as to the reasonableness of the time, the question which was referred to the Twelve Judges, in the case of *Rex v. Gooding*, could not have arisen. In the case of *Rex v. Gooding*, 1 Chet. Burn, 1009, Samuel Gooding was convicted at the London Sessions, in May, 1820, for assisting John Henry Davis to escape from the Giltspur-street Counter, where he had been confined on a charge of forgery. The case was afterwards submitted by his Majesty to the Judges, in consequence of a petition presented by the prisoner Gooding, alleging that Davis never was in legal custody, and, therefore, he (Gooding) could not legally be found guilty in aiding his escape, the fact being, that Davis, at the time of the escape, was under commitment for further examination merely, but no commitment or written authority was ever made out by the Lord Mayor, (who was the committing magistrate), or any other justice of the peace. The only question submitted to the Judges was, whether a commitment for further examination was legal, not being in writing. Their Lordships were unanimously of opinion that such a commitment for a reasonable time, though not in writing, was good; but they added, that they considered reasonable time to be a mixed matter of law and fact; and that, as the facts of the case were not fully detailed, they could form no opinion in fact, whether the time in the particular case was, or was not a reasonable time; but they presumed that it must have appeared at the trial that the time was reasonable, as, otherwise, he ought to have been acquitted. In the case of *Scavage v. Tatham*, Cro. Eliz. 829, a commitment for 18 days for re-examination was held bad, as being for too long a time.

the time when he received the warrant of commitment; and it was imputed, on the part of the plaintiff, that the defendant committed the plaintiff to prison to extort from her a confession as to who was the writer of this letter. On the 12th of February, the plaintiff was taken to the police office at Cheltenham, for re-examination; but the defendant was not there, he having gone to attend a meeting of an insurance company at Gloucester; and the plaintiff was [*137] re-committed by two other magistrates, till the 16th of February, when she was discharged. At the Gloucester Spring assizes, of 1828, Ann Hamerton was tried before Mr. Baron Vaughan, on the charge of stealing the 10l. note, and the scarf, &c., and was convicted, and sentenced to seven years' transportation; and she killed herself in prison on the night of her conviction.

For the plaintiff it was contended, that this commitment was illegal; first, on the ground that it was a commitment for the purpose of extorting a confession; and, secondly, on the ground that a commitment for fifteen days for re-examination was bad in point of law, as being for too long a time.

Taunton, for the defendant, submitted, that the plaintiff should be nonsuited, on the ground that the action ought to have been in case and not trespass; the defendant having had jurisdiction over the subject-matter.

Mr. Baron VAUGHAN. I will, to save further expense, give you leave to move to enter a nonsuit, if the Court above should think that there is anything in the objection; my own opinion is, that the form of the present action is right.

Taunton addressed the Jury for the defendant, and contended, that it was not proved that the plaintiff was committed with a view of extorting a confession; and that a commitment for further examination, though for fifteen days, was, in this case, matter of mercy to the plaintiff, as the magistrate might have fully committed her till the Assizes, which would have been a much longer period. And he also argued, that the defendant was perfectly justified in committing, in this case, for fifteen days, as in the letter, which the defendant believed to be genuine, the writer spoke of delaying for a fortnight; and the *defendant, [*138] therefore, committed for such a period as would just go over that time.

For the defence, a police officer, named Russell, was called. He stated, that the defendant committed the plaintiff for fifteen days, by his advice; but he admitted, that he knew of no inquiries being made respecting the writer of the letter, except in Cheltenham, all which inquiries might have been made in a few hours.

Mr. Baron VAUGHAN (in summing up). The question here is, whether Mr. Capper has exceeded his jurisdiction; for, if he has, I think that he is answerable in this action. That question involves two points, which are these:—Was this a commitment not made *bonâ fide*, but tainted with some sinister motive, such as the hope of extorting a confession? or was it, without being made from a corrupt motive, a commitment for an unreasonable time? In either of these cases, it would be illegal. There is no doubt, that, on charges of felony, a magistrate has a power to commit for further examination, but that can only be for a reasonable time; and as to what is a reasonable time, that must greatly depend upon the circumstances of each particular case. The question of reasonable time is a mixed question of law and fact. Whether the facts were such as have been detailed in evidence, is a question for you; but if you are satisfied that these were the facts, it will be for me to tell you, as matter of law, whether the commitment was for a reasonable time. Now, fifteen days is, in my judgment, an unreasonable time, unless there be circumstances to account for it, and these circumstances it will be incumbent on the magistrate to show. Then let us consider what is shown here. In this case, a woman named Hamerton makes an accusation, unsupported by any corroboration, except a letter, which never reached the hands of the plaintiff, and the defendant commits her for fifteen days. *On these facts, I am of opinion, that this commitment is illegal, as [*139] being for an unreasonable time. It appears, that, on the 12th of February, when the plaintiff was brought up for re-examination, Mr. Capper was attend-

ing an insurance company's meeting, instead of being in attendance to hear the further examination. Now, I have no hesitation in saying, that when a magistrate commits a person till a certain day, for further examination, it is his bounden duty to be in attendance on that day, to take the further examination, and to discharge the party if there be not sufficient evidence to warrant a further commitment.

The Jury returned the following verdict, (in writing)—“We consider that Mr. Capper has acted *bonâ fide*, and without any impure motives, in the committal of Mary Davis for re-examination. We consider the period of committal unreasonable. We find for the plaintiff.—Damages 10*l*.”

Curwood, Godson, and Carrington, for the plaintiff.

Taunton, and Ludlow, Serjts., for the defendant.

[Attorneys—*Collier, and Pruett & Co.*]

In the ensuing term, *Taunton* moved to enter a nonsuit, on the ground that the form of the action should have been case, and not trespass; but the Court refused a rule.(a)

(a) See the cases of *Crepps v. Durden*, 2 Cowp. 640; *Morgan v. Hughes*, 2 T. R. 225; *Lowther v. Lord Radnor*, 8 Ea. 113; *Gray v. Cookson*, 16 Ea. 13; *Groome v. Forrester*, 5 M. & S. 314; *Hill v. Yates*, 8 Taunt. 182; *Cox v. Coleridge*, 2 D. & R. 86; *Wright v. Court*, 6 D. & R. 623; *Pike v. Carter*, 10 Moore, 376; and *Beckwith v. Philby*, 6 B. & C. 635.

CASES
AT
NISI PRIUS.

COURT OF COMMON PLEAS.

SECOND SITTING AT WESTMINSTER, IN MICHAELMAS
TERM, 1829.

BEFORE LORD CHIEF JUSTICE TINDAL.

NORTHAM v. LATOUCHE. Nov. 18.

To justify the Jury in giving a verdict for the plaintiff, in an action against an insolvent debtor by the endorsee of a bill of exchange, accepted by such debtor, as a security for a debt due to the endorser, and from which he had been discharged under the Insolvent Debtor's Act, they must be satisfied, not only that the plaintiff gave value for the bill, but that he took it, *bond fide*, for his own purposes, without any concert with the endorser, and without any knowledge of the defect in the endorser's title.

The provision in the 76th section of the 7 Geo. 4, c. 57, that a certified copy of the petition, schedule, order of adjudication, &c., "shall, at all times, be admitted in all Courts whatever, as sufficient evidence of the same" does not take away the right of producing in evidence the original order of adjudication procured from the Court.

ASSUMPSIT on a bill of exchange for 1000*l.*, dated December 8th, 1828, drawn by one Joseph Hudson on, and accepted by, the defendant, at two months from the date, made payable to the order of the drawer, and endorsed by him to the plaintiff.

The defendant pleaded, *First*, The general issue; and *Secondly*, this special plea. "And for a further plea in this behalf, the said defendant, by leave of the Court, here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith, that *heretofore, and before the day of exhibiting the plaintiff's bill, to wit, on the 21st day of November, in the year of our Lord 1827, to wit, [*141 at Westminster, &c., by a certain order of adjudication, in that behalf made by the Court for relief of insolvent debtors in England, he the said defendant, then being an insolvent debtor in custody, was duly discharged according to a certain act of parliament, made and passed in the 7th year of the reign of his present Majesty, entitled, 'An act to amend and consolidate the Laws for the Relief of Insolvent Debtors in England,' of and from the said several supposed promises and undertakings, and causes of action, if any, in the said declaration mentioned, and that the said order still remains in full force, and this he, the said defendant, is ready to verify. Wherefore, he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him," &c.

The plaintiff took issue upon the plea of *non assumpsit*, and replied to the special plea, that the defendant "was not discharged of and from the said several promises and undertakings and causes of action in the said declaration mentioned, or any of them, in manner and form as" the defendant had alleged.

The acceptance and endorsement being proved,

Wilde, Serjt., for the defendant. The 61st section of the 7 Geo. 4, c. 57, enacts, "That, after any person shall have become entitled to the benefit of this act, by any such adjudication as aforesaid, no writ of *fiery facias* or *elegit* shall issue on any judgment obtained against such prisoner, for any debt or sum of money, with respect to which such person shall have so become entitled; nor in any action upon any new contract, or security for payment thereof, except upon the judgment entered up against such prisoner, according to this act; and that *if any suit or action shall be brought*, or any *scire facias* be issued against any *142] such person, his or her heirs, executors, or administrators, *for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognisance acknowledged by such person for the same, except as aforesaid, *it shall and may be lawful for such person*, his or her heirs, executors, or administrators, *to plead generally that such person was duly discharged, according to this act, by the order of adjudication made in that behalf, and that such order remains in force*, without pleading any other matter specially; *whereto the plaintiff or plaintiffs shall or may reply generally*, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may show the defendant or defendants not to be entitled to the benefit of this act, or *that such person was not duly discharged*, according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof specially." Now, I submit, that, under this section, it is only necessary for the defendant to prove his discharge, and that this bill was given as a new security for an old debt, and then the plaintiff will be bound to show that he is a *bona fide* holder for a valuable consideration.

Copies of the petition and schedule of the defendant were put in; and a document, purporting to be the order of adjudication, was produced by the defendant's attorney. The copies of the petition and schedule were certified copies, but there was no certificate on the other document.

Russell, Serjt., and *Moody*, objected, that it was not sufficient. By the 76th section of the act of Parliament it is enacted, That the proper officer of the Court shall, on the reasonable request of any prisoner, or of any creditor, or his, her, or their attorney, produce and show, at such times as the Court shall direct, the *143] petition, schedule, *order of adjudication*, and all other orders and proceedings made and had in the matter of such prisoner's petition; and all books, &c., and shall permit them to inspect and examine the same, and shall provide for any such prisoner, &c., requiring the same, a copy or copies of such petition and schedule, or of such part thereof as shall be so required, receiving such fee as the Court shall appoint for so providing the same. And it also goes on to say, "that a copy of such petition, schedule, *order*, and other orders and proceedings, *purporting to be signed by the officer* in whose custody the same shall be or his deputy, certifying the same to be a true copy of such petition, schedule, *order*, or other proceeding, *and sealed with the seal of the said Court, shall*, at all times, *be admitted* in all Courts whatever, and before Commissioners of bankrupt, and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said Court as aforesaid." Now, as the requirements of this section have not been complied with, the instrument produced is not receivable in evidence.

The witness being asked, said, that he received the document from the Insolvent Debtors' Court; that it was the original order of adjudication, and had the seal of the Court affixed to it.

TINDAL, C. J. My opinion is, that, under the section referred to, it is only permissive on the party to give another kind of evidence than the original instrument. I think that the permission given under that section to produce a certified copy, cannot take away the right of the party to give in evidence this, which is an original document.

To impeach the transaction, by connecting the plaintiff with Hudson, the defendant's original creditor, Mr. *Brown, the Warden of the Fleet, was called, and proved, that, a few months before the trial, he met the plaintiff in Fleet Street, at which time the defendant was in his custody; that he told him, referring to the demand for which this action was brought, he was sorry to see so large a detainer lodged against the defendant, adding, that he was in a very low and emaciated state; that he had been in the rules, but was brought within the walls when that detainer came. The plaintiff said, he was sorry for it, but it was done at the desire of Mr. Hudson. It was also proved, that the defendant had been drinking freely, and was in a state of intoxication at the time when he accepted the bill.

In answer to this evidence, Mr. Hudson, the drawer of the bill, was called. He stated, that he was a creditor of Latouche before he took the benefit of the act; and he admitted, that the principal part of the amount of the bill was made up of money due before the discharge; but he stated, that the plaintiff gave him full value for the bill, *viz.* fourteen 50*l.* notes, and a bond of a deceased nobleman for 800*l.* Being asked whether, at the time the money was paid, he told Northam, the plaintiff, who Latouche, the defendant, was? his reply was, that Northam knew that before.

Russell, Serjt., in reply. The question is, whether the plaintiff, being the endorsee of the bill, is not entitled to recover. I admit that it was given for the old debt, which was due to Hudson before the discharge. But I contend, upon the authority of *Lucas v. Winton*,^(a) and *Simpson v. Pogson and Wife*,^(b) that, supposing this to be a *fraudulent preference of Hudson, yet it is no bar to an action by Northam, an innocent endorsee, and holder for value. There is no evidence which shows that Northam knew that the bill was accepted in respect of any debt, from which Latouche had been previously discharged.

TINDAL, C. J. (in summing up) said—There are only two questions for your consideration: *First*, whether this bill of exchange was given to satisfy an old debt, which had been barred by a discharge under the Insolvent Debtors Act; and *Secondly*, whether, if it were so, it was taken by Northam for a valuable consideration, *bond fide*, and for his own purposes, without any concert with Hudson, the drawer. As to the first point, the evidence is quite clear. In point of principle, if the statute only had the effect of protecting persons who have been discharged under its provisions, from being sued by the individual, to whom a new security for an old debt was given; it would but ill provide for its intention; for a third person might stand by and see the security given, and then take it and sue upon it. Therefore, such a security remains, as it were, with a mark upon it, unless it is taken by a third person innocently, and in the ordinary exercise of the concerns of business. The question for you on this part of the case is, whether Mr. Northam and Mr. Hudson are distinct persons, or acting in concert in this transaction. With respect to the state of intoxication in which the defendant is said to have been when he accepted the bill, I do not think that is for you to consider; because, I think it would be no answer, unless the plaintiff were *shown in some way or other to be conscious of such situation. In order to entitle the plaintiff to recover, you must be satisfied that he gave value for the bill, and that it was not intended that it should be handed back in the event of the action's not succeeding. You must be satisfied that he took it, *bond fide*, for his own purposes, without being

(a) 2 Camp. 443. "After the 1st day of February, 1809, a promissory note was given for an antecedent debt:—Held, that as against the payee the maker would have been discharged under the Insolvent Debtors' Act, 44 Geo. 3, c. 115, but that he was not as against a person to whom the note was subsequently endorsed."

(b) 3 D. & R. 567. "The creditor of an insolvent debtor, who has petitioned to be discharged under the Insolvent Act, obtains from his debtor, whilst in prison, a bill of exchange for his debt, and endorses it to an innocent holder, for valuable consideration:—Held, that though this might be a fraudulent preference of the creditor, the insolvent's discharge was no bar to an action upon the bill by the innocent endorsee."

conscious of any defect in the transaction—as a common discount—as man would deal with man in the ordinary transactions of life. It appears, that Hudson, being asked whether he told Northam who Latouche was, made this reply—that Northam knew that before. Taking all the facts of the case together, you will ask yourselves whether this bill was taken by the plaintiff (he having paid full value for it), with a knowledge of the latent defect in the title, or the contrary; and, according as your opinion is upon that point, you will find your verdict for the plaintiff or the defendant.

Verdict for the defendant.

Russell, Serjt., and *Moody*, for the plaintiff.

Wilde, Serjt., and *Steer*, for the defendant.

[Attorneys—*Friswell*, and *H. Berry*.]

SITTING AT WESTMINSTER AFTER MICHAELMAS TERM, 1829.

BEFORE LORD CHIEF JUSTICE TINDAL.

DOE dem. TIMS v. JORDAN. Nov. 30.

In an action of ejectment by the reversioner (on the expiration of a building lease), to recover possession of a house, which adjoined one that the lessor of the plaintiff had sold to the defendant, and the description of which, in the surrender (it being copyhold), contained the words “as now occupied by A. B., or his under-tenants;” an under-lease (granted pending the existence of the original building-lease) under which A. B. claimed the ground upon which both the houses were built, was received as evidence of the mode in which the property had been enjoyed.

EJECTMENT to recover possession of a house, No. 84, in John street.

*147] The lessor of the plaintiff claimed as the reversioner on the expiration of a building lease (which comprised four acres of land), granted in the year 1711, and expiring at Michaelmas, 1828. The premises were copyhold, and the lessor of the plaintiff had sold the adjoining house, No. 9, in Goodge street, to the defendant, in the year 1815; and the defence was, that the premises in question passed under the surrender of that property. That surrender was in these words, “all my right, title, and estate, in and to the house called the Valiant Trooper, and numbered 9, in Goodge street, and the small yard adjoining to the same, as now occupied by A. B., or his under-tenants.”

To prove this defence, the defendant offered in evidence a lease, dated in the year 1763, for 65 years, granted by certain persons to certain other persons, under whom A. B. claimed the plot of ground on which both houses were built; and also the assignment of the lease to A. B. The description of the premises in the lease was as follows:—“All that piece or parcel of land, containing, by admeasurement, thirty square feet, on which a house is now building, and on which other erections are to be made.” It was further proved, that, in the year 1815, the house, No. 84, in John street was occupied by a person who paid rent to A. B.

This evidence was objected to, on the ground that the lease was one to which the lessor of the plaintiff, or those under whom he claimed, were neither of them parties, and that his rights could not be affected at the expiration of the lease of 1711, by the mode in which the lessee, or his assigns, had dealt with the property, and made under-leases during that term.

TINDAL, C. J., overruled the objection, and admitted the lease of 1763 and the subsequent assignment, as evidence of the mode in which the property had been enjoyed.

The plaintiff had a verdict.

**Adams* and *Merewether*, Serjts., and *Secker*, for the plaintiff.
Wilde, Serjt., and *Hutchinson*, for the defendant.
 [Attorneys—*Roche & P.*, and *Phillips*.]

[*148]

HAWKINGS v. INWOOD. Nov. 30.

A witness called for the defendant stated, on the *voire dire*, that he was bail to the Sheriff in the action, but did not justify, and that he had not done anything to get the recognisance he had entered into discharged. He added, that other bail justified, but it appeared that he did not see them do so:—Held, that he was not a competent witness.

ASSUMPSIT for goods sold. Plea—General issue.—The defence was, that the defendant was a young man under age, and that the plaintiff had taken advantage of his indiscretion, and improperly furnished him with goods unsuited to his situation.

To make out this defence, a witness, named Smith, was called. Being examined on the *voire dire*, by *Wilde*, Serjt., for the plaintiff, he said that he was bail to the Sheriff for the defendant, that he did not justify, but he had not done anything to get the recognisance he had entered into discharged. On further questioning, he said, that bail had justified for the defendant, but he was not present when they did so, and only knew it from what he had been told.

TINDAL, C. J. The explanation of the witness is not sufficient. I am of opinion that he is not competent.

Wilde, Serjt. The Court have decided very lately, that, as long as the name continues in the bail-piece, the party is liable.

Adams, Serjt., for the defendant. As the examination is on the *voire dire*, we must take the answer of the witness; and, he having stated that other bail justified, that is quite sufficient.

TINDAL, C. J. I allow that the answer of the witness is to be conclusive; but that answer must show that he is *no longer bail. He has said, [*149 that he was not in Court when any one else justified. The only difference between the examination on the *voire dire*, and the general examination, is, that it is not necessary to produce written instruments to prove a fact, if the witness can speak to it of his own knowledge, but it is not to let him in to give evidence of what he has heard other people say.

There being no other witness, the defendant was unable to make out his case, and there was a Verdict for the plaintiff.

Wilde, Serjt., and *Chitty*, for the plaintiff.

Adams, Serjt., and *Hutchinson*, for the defendant.

[Attorneys—*Chappell*, and *Vincent*.]

ADJOURNED SITTING IN LONDON, AFTER MICHAELMAS TERM, 1829.

BEFORE LORD CHIEF JUSTICE TINDAL.

LAW v. GUNBY. Dec. 5.

A receipt in the following form: "Received of W. C. the sum of 9l. in full for what I done for him," is not a receipt in full of all demands, so as to require a 10s. stamp.

ASSUMPSIT for work and labour. The defendant was the representative of a

person named Couzens. The plaintiff was a carpenter, and the demand was partly for work done to houses in Lock's Fields, Walworth, of which Couzens was the owner; and partly for service performed by the plaintiff's wife, as attendant upon Couzens while he was confined in the King's Bench Prison.

For the defendant the following receipt was put in :

"Received of William Couzens the sum of 9*l*., in full for what I done for him. By me, WILLIAM LAW."

*150] *Spankie*, Serjt., for the plaintiff, submitted, that if this receipt was to be admitted at all, it must be, as in fact and effect, a receipt in full of all demands, intended to exclude the making of any claim by the plaintiff, and could not, therefore, be read without a 10*s*. stamp.

Wilde, Serjt., contended that it was not a receipt in full of all demands, but only in full for a particular kind of demand. It might be confined to the work done as a carpenter.

TINDAL, C. J. I take it that the object of the Legislature, in requiring that the larger stamp of 10*s*. should be put upon a receipt in full of all demands, was to prevent the necessity, where such a receipt was given, of being prepared with any other evidence. But looking at the words of this receipt, it appears to me, that it would not have the effect of preventing the party from coming prepared with other evidence to meet any claim upon him. I am, therefore, of opinion, that it does not require the 10*s*. stamp.

The receipt was admitted, and the verdict was eventually for the plaintiff for 27*l*. 7*s*., being for the service of the plaintiff's wife at the rate of 1*s*. a day, during the time that Couzens was in prison.

Spankie, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attorneys—*H. Chester*, and *Allen & T.*]

*151] *EMES and Another v. WIDDOWSON. Dec. 8.

An assignment of property for the purpose of securing debts due and to be due, with a power of sale upon giving six months' notice, is only a collateral security; and, without a special clause to that effect, does not suspend the remedy by action against the debtor.

ASSUMPSIT on two bills of exchange, drawer against acceptor. The formal proof for the plaintiff having been given—

Wilde, Serjt., for the defendant, stated, that the defendant and the plaintiffs came to an arrangement together; in consequence of which, the defendant assigned certain property as a security for certain sums then due, and also for all future demands. There was a power of sale in the assignment, but it was not to be executed until after six months' notice. Such notice had not been given, but the defence proceeded upon the ground that the personal remedy was, notwithstanding, suspended.

TINDAL, C. J. I am of opinion that such an assignment can only be considered as a collateral security, and that the personal remedy is not suspended, as there is not any clause to that effect in the deed. It is no answer to the action, and the plaintiffs are entitled to the verdict.

Verdict for the plaintiffs.

Storks, Serjt., and *Smith*, for the plaintiffs.

Wilde, Serjt., and *Platt*, for the defendant.

[Attorneys—*Phipps* and *Shirreff.*]

*BLEADEN and Another v. HANCOCK. Dec. 10.

Two persons, jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate actions of trover in respect of it, against a person who unjustly detains it.

If a party claim a lien on plates for his bill for printing from them, in order to establish it, he must show a course of dealing so general and uniform, that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage.

Semble, that there is no such usage, with respect to *stereotype*, and *quære* if there be with respect to *copper-plate* printing.

TROVER, for stereotype and other plates. Plea—not guilty.

The plaintiffs were the assignees of a bankrupt, named Bumpus, who carried on the business of a bookseller and publisher, in Skinner Street; and the defendant was a printer, in Holborn, who had been employed to print, from stereotype plates, several popular works, of some of which the bankrupt was the sole proprietor, and in others of which he had a half share, in conjunction with a person named Taylor. The commission against Bumpus was dated the 26th of January, 1826. In the month of November 1827, the accountant for the assignees tendered to the defendant a sum of 123*l.* to cover some advances in the way of discount, which he had made to the bankrupt, and demanded the plates, on behalf of the assignees. The defendant refused to deliver them up, saying, that he had a lien on them for the balance of his demand for printing. The plates were advertised for sale on the 20th of December. On the morning of that day the accountant of the assignees went to the auctioneer, and told him that the assignees could not allow these plates to be sold, and that he should stay, in order to forbid the sale. Upon which the auctioneer communicated with the defendant, who was at the time in the sale room; and on his return to the accountant, gave him a memorandum, addressed to the assignees, stating, that the plates were about to be sold, not by their “consent or concurrence, but on the contrary.” Previously to this, the defendant had sent to the plaintiffs a notice, in the following form:—

“To John Bleaden, and Henry Thomas Curtis, assignees of the estate and effects of John Bumpus, a bankrupt; and to Benjamin Hanbury, and Henry Thomas Curtis, *assignees of the estate and effects of Charles Taylor, [†153 a bankrupt.

“I do hereby give you notice, severally, that I now have in my possession certain stereotype plates, the joint property of the above-named bankrupts; and certain others, the property of the said John Bumpus; which were respectively deposited with me some years ago, for the purpose of printing certain books therefrom for the said bankrupts; and which plates I hold until my accounts for such printing are paid or satisfied. And I do hereby further give you notice, that there is now due to me, in respect thereof, the sum of 420*l.* 10*s.* 6*d.*; and I therefore call upon you forthwith to pay the said sum of 420*l.* 10*s.* 6*d.*, or sell the said plates, and pay me the proceeds thereof, in liquidation or part liquidation, as the case may be, of my said demand; and in the event of your declining to do so, within fourteen days from the date hereof, I do hereby further give you notice, that I shall thereafter proceed to sell the same plates by public auction, and apply the produce of such sale, after payment of all expenses, in discharge of the said sum of 420*l.* 10*s.* 6*d.*, so due to me as aforesaid, if the same will so far extend; and, if more than sufficient, I shall pay you over the surplus.”

The demand made by the accountant of the assignees, on the 24th of November, 1827, was in writing, and in these words:—

“We, the undersigned H. T. C., and J. B., the assignees appointed under a commission of bankrupt against John Bumpus; and we, the undersigned B. H. and the said H. T. C., the assignees appointed under a commission of bankrupt against Charles Taylor, do hereby demand the delivery to us, or to our agent, Mr. Andrew Duncan, of, &c., for that purpose authorized, certain stereotype plates in your possession, used for the printing of the following works (that is to say), Hume and Smollett’s History of England, &c., the joint property of us,

*154] as such *assignees as aforesaid; and we, the said H. T. C., and J. B., as such assignees of the said John Bumpus, do hereby also demand the delivery to us; or to the said Mr. A. D., &c., of the stereotype plates used for the printing of the following works [naming them], the property of us, the said H. T. C., and J. B., as such assignees of the said John Bumpus, as aforesaid. Dated this 23d day of November, 1827.

Taddy, Serjt., for the defendant, submitted, that, as to those plates, in which there was a joint property, the action was not maintainable. The demand is made by the assignees of Bumpus, and the assignees of Taylor, and the action is not maintainable, because the property is in an article not in itself divisible. There is a tenancy in common in certain persons, who make a joint demand. Their property is never severed. Parties may sever, and then maintain separate actions; as in the cases of *Sedgeworth v. Overend*, 6 T. R. 766, and *Addison v. Overend*, 7 T. R. 279, in which cases the article was wholly destroyed. But here, instead of severing, they join, and make a joint demand, and they must bring a joint action, and not subject the party to two actions. They cannot, by a joint demand, support a separate action.

TINDAL, C. J. It appears to me to be the ordinary case. Two persons, interested in a chattel, bring separate actions for a tort. The damages may be severed. They are not so tied together by the joint demand, that they may not sever even when they come into Court.

Taddy, Serjt., then objected, that, with respect to those plates, which had been sold, but were not mentioned in the written demand, there was no evidence of conversion by the defendant; as it had not been shown either that he ordered the sale, or that he had received the proceeds of it; and, without showing one *155] of these things, though the *assignees might have their action of trover against the auctioneer for selling, yet they could not maintain it against the defendant.

TINDAL, C. J. I think it is a question for the Jury, whether they will presume an authority from the defendant to the auctioneer, from the circumstance of his having declared an intention to detain the plates, and to sell them by auction, in order to satisfy his claim.

It appeared, that the following certificate, endorsed on the printed catalogue, had been signed by the assignees, and sent to the Excise Office, to save the auction duty:—"We do hereby certify, that Lots 1 to 1314, 1315 to 1323, 1326, 1330, 1341 to 1516, enumerated in this catalogue, and sold for 1186*l.* 18*s.*, were the property of John Bumpus, bankrupt, at the time the commission was issued against him, and that the same were sold for the benefit of his creditors. JOHN BLEADEN, and HENRY THOMAS CURTIS, assignees."

Taddy, Serjt., contended, that the assignees' could not, after having done this act, say, that the sale took place without their assent.

But, upon this point, TINDAL, C. J., said, that it was a question for the Jury, whether, under the act of parliament, it was not proper for the assignees to certify, that it was a sale of the bankrupt's property, although it was not made for the general benefit, because the payment of the duty would be so much ultimately to be deducted from the amount of the bankrupt's estate.

The substantial defence was a claim of lien upon the plates, for the amount of the bill for printing from them. To establish this, several witnesses were *156] called on the part of the defendant. Some of them were copper-plate, *and others stereotype, printers. They proved various instances, in both trades, in which the claim had been made and acquiesced in. But, for the plaintiffs, in reply, other persons in those trades were called, who stated other cases in which it had been successfully resisted.

TINDAL, C. J. (in his summing up) said, upon the subject of the lien—This is not the case of a lien claimed by a person who has bestowed labour, or expended money upon an article, and who may detain it till he is paid. Everybody knows, that, by the common law, a man may detain the commodity on which he has bestowed labour or money. But this is a claim of a larger lien, and those

who seek to establish such a lien must show a course of dealing so general and uniform, that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage. And it is for you to say, whether, in this case, any such uniform usage has been proved to your satisfaction. You ought to be satisfied, that it is established affirmatively before you find in favour of it.

The Jury found against the claim of lien, and gave their verdict generally for the plaintiffs for 646*l*.

Wilde, and *Jones*, Serjts., and *Chitty*, for the plaintiffs.

Taddy, Serjt., and *Payne*, for the defendant.

[Attorneys—*J. & T. Davies*, and *Burn*.]

*HUMPHREYS v. BRIANT. Dec. 4.

[*157]

A. having goods at the wharf of B., which C. had conveyed there by ship, gave B. a paper, by which he authorized him to sell the goods, and out of the proceeds to pay C. the balance due to him for freight, mentioning the sum; B. sold the goods, and received the proceeds: Held, in common *assumpsit* by C. against B. for the sum mentioned in the paper, that the paper neither required a stamp, nor ought to have been declared upon specially.

ASSUMPSIT for money had and received to the plaintiff's use.

The plaintiff was the captain of a ship, called the *Hope*, and the defendant was a wharfinger, to whose wharf the cargo, consisting of bricks, &c., was sent by a person named Jameson.

It appeared, that there was a difficulty about the payment of the balance of the freight, part having been paid by Mr. Jameson; and, on the 9th of October, 1828, a conversation took place between Jameson, the defendant, and the plaintiff's attorney, about the amount of the freight. The defendant produced a written authority, which Mr. Jameson had given him that morning, and asked the plaintiff's attorney if he would agree to the arrangement mentioned in it. The plaintiff's attorney did agree to it; and afterwards urged the defendant several times to sell the bricks, pursuant to the authority; and he subsequently admitted to him, that he had sold them, and received the proceeds of the sale.

The authority (which was not stamped) was in these words:—

"I hereby authorize Mr. J. W. Briant to sell the bricks or tiles, landed out of the *Hope*, and thereout of the proceeds to pay Captain Robert Humphreys the remainder of his freight, 24*l*. 7*s*. 6*d*."

"WM. JAMESON."

"9th October, 1828."

Spankie, Serjt., for the defendant, submitted—*First*, that the paper, though in form an authority to sell, was, in effect and substance, an order for the payment of money, and, therefore, required a stamp: and, *Secondly*, that if it could be read without a stamp, the plaintiff could not *maintain the action for money had and received; as it was a special undertaking, of [*158 which the considerations were manifest; it was an engagement to pay on a collateral undertaking.

TINDAL, C. J. With respect to the *first* objection, I am of opinion, that the instrument in question is an authority which does not require a stamp. With respect to the *second*, my opinion is, that if they had declared while the authority was unexecuted, they must have declared specially; but, after the sale, and the receipt of the money, there is no doubt that this form of action will do.

Verdict for the plaintiff.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Spankie, Serjt., for the defendant.

[Attorneys—*G. Jones*, and *Van Sandau & Brown*.]

See the case of *Emly v. Collins*, 6 M. & S. 144.

THOMPSON v. FINDEN. Dec. 12.

In an action against one of the owners, for work done to a vessel, by the order of the ship's husband, such owner will be liable, unless it be shown, that the dealing was, that the person who directed the work to be done should be looked to *exclusively*.

ASSUMPSIT for work and labour against the defendant, as one of the owners of several vessels. Plea—General issue.

On the part of the plaintiff, it appeared, that the work was done on the order of a person named Butcher, who was the ship's husband to all the vessels, and a part owner of some of them; and it appeared, partly from transfers, partly from letters written by the defendant, who was a widow lady residing in the country, and partly from conversations with her, that she had an interest in all the vessels to which the work had been done.

*159] *Jones*, Serjt., for the defendant, submitted, that, as the work was done on the order of Butcher, it must be taken, that exclusive credit had been given to him; and therefore, that the defendant, as an owner, was not liable.

TINDAL, C. J. I should think an exclusive credit would be a *giving up* of the owners generally, and the making an exclusive bargain with the person who orders the goods, and an agreement to furnish them on his credit only. But as to some of the vessels, the case does not come within that principle; and as to them, the question is, whether, if goods are ordered by one joint owner, the party furnishing them may not, if he finds them out, bring an action against the other owners; and I have no hesitation in saying that he may.

Jones, Serjt. My defence is twofold. *First*, I shall satisfy the Jury that the credit was given personally to Butcher; and, therefore, I shall contend, that the owners are discharged; and *Secondly*, I shall show, that an action has been brought, and a judgment recovered against the father of Butcher, whose wife was a joint-owner; and I shall submit, that they cannot, after that, bring a fresh action.

TINDAL, C. J. Do you propose to show, that there was satisfaction as well as a judgment?

Jones, Serjt. I submit, that it is not necessary, and that they cannot bring a fresh action after judgment recovered, as there might be a plea in abatement.

Notice had been given to produce the plaintiff's books. The day-book and the ledger were not produced, but the ledger was offered, and not accepted.

*160] *Jones*, Serjt., then called the plaintiff's attorney, and *asked* him, whether he was attorney in an action brought against Butcher, senior, by the plaintiff in the present action. He replied, that he was; and admitted, that he had received a notice from the defendant's attorney, to produce the papers, and the judgment in the cause.

Bompas, Serjt., objected to this evidence; and TINDAL, C. J., said, the judgment is not in the custody of the defendant. You should have taken out a summons to get the record made up, and have taken an examined copy of it. (a)

TINDAL, C. J., in his summing up, said—We must not try this cause as a matter of feeling, but according to the rules of law. Suppose the books of the plaintiff had been produced, and the name of Butcher only found there, that would not make any difference. The question is, whether Mrs. Finden was not a joint-owner; and, on the evidence, there can be no doubt that she was. She may sue for contribution from the other joint-owners. Unless the defendant could show, that the dealing was, that Butcher should be looked to *exclusively*, the verdict must be for the plaintiff.

Verdict for the plaintiff.

Bompas, Serjt., and *Follett*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attorneys—*D. Jordenon*, and *Becke*.]

(a) See, as to proof of judgments, the cases of *Godefroy v. Jay*, 3 C. & P. 192, and *Webb v. Hill*, Ib. 485.

*MASSEY v. GOYDER, BUGBY, WOODROFFE the Elder, FOWLER, WOODROFFE the Younger, and BROWNE. Dec. 14. [*161]

Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of such adjoining premises rested:—It was held, that the party giving the notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old.

THE first count of the declaration stated, that the plaintiff was lawfully possessed of a certain messuage or dwelling-house and premises, and that the defendants had pulled down, and caused to be pulled down, a certain chapel or building contiguous to, and next adjoining the said messuage or dwelling-house; and that they wrongfully and injuriously sunk, dug, and made, and caused to be sunk, dug, and made the foundation on which the walls of the said chapel or building had before then stood, much lower and deeper than it had theretofore been, and also much lower and deeper than the foundation of the said messuage or dwelling-house; and also set up, erected, and built, and caused to be set up, erected, and built thereon, divers walls, and a certain other chapel or building of great weight, without previously giving to the said plaintiff due and proper notice of such digging and deepening the said foundation, and of setting up, erecting, and building, the said walls thereon; so that the said plaintiff might have had the opportunity of taking and using such precautionary and reasonable measures as might have been deemed necessary for the safety and preservation of his said messuage or dwelling, and the foundation thereof, and for the prevention of any injury or damage thereto; and that they, the said defendants, kept and continued such walls, and the said chapel or buildings so erected, raised, and built, for a long time; by means of which several premises, and for want of due and proper notice of the digging and deepening of such foundation, the said messuage or dwelling-house of the said plaintiff, and the walls and foundation, became and were greatly disturbed and unsettled, and greatly cracked, broken, damaged, and spoiled, and the said messuage or dwelling-house was rendered wholly uninhabitable, and of little or no value to the plaintiff, &c.

The second count was similar to the first, except that, *instead of stating that the defendants erected and built "certain walls, and a certain [*162 other building or chapel," it merely stated, that they erected "a certain wall."

The third count only complained of the deepening of the foundation, and omitted the part relating to the erection.

The fourth count, after stating that the defendants had deepened the foundation, and had erected divers walls upon it, went on to aver, that they so carelessly, negligently, and improperly, behaved and conducted themselves in and about the digging and deepening the said foundation, and in setting up, erecting, and making the said walls on such foundation, that, by and through the mere carelessness, negligence, and improper conduct of the said defendants, and their servants and workmen, the messuage or dwelling-house of the plaintiff, and the walls and foundation thereof became and were greatly disturbed, shaken, and unsettled, &c., and greatly cracked, &c., whereby the house was rendered uninhabitable, and the plaintiff lost divers gains and profits, which would otherwise have accrued to him from the possession, occupation, use, and enjoyment thereof. The defendants pleaded—Not guilty. (a)

(a) The defendant Browne pleaded by a different attorney from the other defendants; and his counsel addressed the Jury for him. Where several defendants plead separately, but by one attorney, it is doubtful whether, if they employ separate counsel, those counsel will each have the right to address the Jury. Mr. Justice Parke, in the Common Pleas, has intimated, that he would not permit it to be done. In a late case in the Court of King's Bench, in which Mr. Gurney and Mr. White were for one defendant, and Mr. Denman for another, Mr. Gurney and Mr. Denman both addressed the Jury, without any objection being made on the part of the counsel for the plaintiff. See, as to this point, the cases of *Batty v. M^r Cundie*, 3 C. & P. 204, n. (a); *Doe v. Tindale*, lb. 565; *Perring v. Tucker*, ante, p. 70; and the case there cited.

The plaintiff was a cabinet-maker, and was the lessee of a house in the Waterloo Road, adjoining to a building called the New Jerusalem Church, of which *163] the defendant Browne was the builder, and the other defendants *were trustees and committee-men. A chapel stood formerly on the same ground, and it appeared that the wall of the plaintiff's house, which was erected some considerable time after that chapel, rested partly on the projecting footing of one of its walls. And the plaintiff complained, that, when that chapel was taken down, and the space for the foundation of the new one dug, which foundation was lower than the old one, and, of course, also lower than that of the plaintiff's house, the soil, which was of a soft alluvial nature, escaped from under that part of his wall which was exposed, and caused a settlement of the wall, which produced cracks in the house, and did other injuries to the premises, which were estimated at 250*l*. The plaintiff denied that any notice had been given of the intention to pull down the chapel. There was no underpinning of the plaintiff's wall, and his witnesses said, that, if there had been, the injury complained of would not have happened. The digging for the foundation only proceeded for the space of five or six feet at a time, and that space was filled with concrete, which was suffered to become hard before any further digging took place.

On the part of the defendants, it was proved, that, for several months prior to the month of June 1828, a board had been erected in front of the old chapel, and that printed bills were stuck upon it, notifying, that the society would "meet for public worship at the Rev. Mr. Sibley's chapel, in Friar's Street, Doctors' Commons, during the rebuilding of the new church." and that, in addition to this, the foreman to the defendant Browne inquired of a person, named Day, who was lodging in the plaintiff's house, for the address of the owner; and being told that it was Mrs. Tyler, of Leicester Square, caused the following notice to be served upon her:—

"London, 3d July, 1828.

"Madam,—In consequence of taking down the building, known as the New Jerusalem Church, in the Waterloo-bridge Road, adjoining your premises, I am *164] directed to *write to request you to attend or appoint some person on your part, to meet me on the premises to-morrow, at eleven o'clock, to determine what is necessary to be done in shoring up your premises prior to removing the foundation of the old church.—I am, &c., for J. Browne,

"To Mrs. Tyler, 49 Leicester Square."

"H. LORDEN.

The next morning Mrs. Tyler, accompanied by Day, the lodger, came to the foreman, and it was arranged that shores should be put up on the outside of the wall of the plaintiff's house. The plaintiff lived in the house in Leicester Square, to which the notice was sent, and several times spoke of his having received it. The plaintiff refused to allow the builder's foreman to shore up the wall on the inside. It was doubtful whether a considerable part of the injury to the plaintiff's house had not resulted from a settlement of the old chapel.

On the part of the defendants, the giving of notice was relied on as an answer to the action; and it was further contended, that, as the plaintiff's wall rested on the footing of that of the old chapel, the defendants, having occasion to pull down that chapel, were not answerable for any damage sustained by the plaintiff, because it arose from his own act in so erecting his wall, and not from any improper conduct upon their part. Allusion was made to the case of *Peyton v. St. Thomas's Hospital*.(a)

(a) That case was not then, but has been since, reported, and, from the account of it given in 9 B & C. p. 725, it appears, that it was an action on the case, by a reversioner, for an injury done to a house in Cheapside, by the pulling down of an adjoining house by the owner, without any previous shoring up of the plaintiff's premises; and it was held—First, that the plaintiff could not recover, on the ground of want of notice, that not being alleged in the declaration as a cause of the injury; and, Secondly, that, as the plaintiff had neither alleged nor proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it.

**Spankie*, Serjt., for the plaintiff. In the civil law it is laid down, [*165 that a man has no right to make a new erection without giving notice of his intention; and the Prætor, according to that law, might compel him to give security, to prevent any injury to the adjoining premises; and by the law of England such notice is necessary. In this case, the right to build a chapel was subordinate to the right the plaintiff had of having his house uninjured. It was the duty of the defendants so to build their wall as not to shake the foundation of the adjoining house. The case of *Peyton v. St. Thomas's Hospital* differs from the present, as that was a case merely of pulling down a house, and there was no question about altering the foundations, or digging new ones. There was nothing to vary the mode in which both the parties had used and enjoyed their respective houses. But it has never yet been decided, that a party who is going to do something new is not bound to give notice of his intention to the occupier of the adjoining premises. It seems there was a raking shore, but that was of no use. The injury arose from taking away the foundation by digging deep, and the only operation which could have enabled the plaintiff's house to stand would have been that of underpinning its wall. The foundation of the plaintiff's house having been in part supported by the footing of the old chapel wall, we contend, *first*, that the defendants were bound to protect their neighbour, whom they were putting in danger; and, *secondly*, that whether they were or not, at least they ought to have given distinct notice of their intention, not only to pull down the old building, but to dig their new foundations three feet deeper than the old ones.

TINDAL, C. J., left three questions to the Jury—*First*, whether the injury to the plaintiff's house was, in fact, imputable to the alteration of the chapel; *secondly*, whether any notice was given to the plaintiff, calling his attention *to what was about to be done; and, *thirdly* (supposing they should [*166 answer both these questions in the affirmative), whether the defendants had used reasonable and ordinary care in the doing of the work; for, if they had used such care, having given notice to the plaintiff, they would not, in point of law, be answerable for the injury sustained.

The Jury found, that the plaintiff had notice, but gave their verdict for him, with 40s. damages. This verdict was eventually entered on the last count in the declaration only.

Spankie, Serjt., *Comyn*, and *Brodrick*, for the plaintiff.

Wilde, Serjt., and *Hutchinson*, for all the defendants, except Browne.

Jones, Serjt., for the defendant Browne.

[Attorneys—*Van Sandau & Brown*, and *Martineau & Malton*, and *J. Leachman*.]

See the case of *Jones v. Bird and Others*, 5 B. & A. 837, and *Walters and Others v. Pfeil*, 1 M. & M. 362.

DAVIES and Others, Assignees of LEGH, a Bankrupt,
v. BURTON. Dec. 16.

A defendant, in a suit by assignees of a bankrupt, was told, at an interview with the attorney for the assignees (which was arranged by his own attorney, but which he thought proper to attend alone), that his attorney had proposed that he should admit every fact, *except the merits*, provided the plaintiffs would waive their right of holding him to bail; and he was asked, whether that proposal was made with his authority. He replied, that it was; and that he was ready to carry it into effect, as *the only question he wished to try was, whether he was liable on the undertaking he had given*—Held, that this amounted to an admission of the right of the assignees to sue, although no mention was made of it in the conversation. *Seemle*, that it would have been otherwise, if, without further explanation, he had only said that he wished to *try upon the merits*.

Held, also, that having received advantage from the admission in the waiver of the right to hold to bail, he could not afterwards withdraw it, and insist upon proof of the bankruptcy.

THE declaration stated, in substance, that Legh, the bankrupt, delivered

*167] several bills of exchange to the *defendant, who undertook to settle certain actions which had been brought against him, or to return them to him. It then averred, that the actions were not settled, but that the defendant, notwithstanding, refused to return the bills, and converted them to his own use. Plea—The general issue.

It appeared, that bills, amounting to 1450*l.*, were delivered to the defendant, who, on receiving them, signed the following memorandum:—

“31st May, 1822.

Mr. Legh,—I acknowledge to have received from you Bank’s acceptances for 1450*l.*, which I undertake to return to you, or get you discharged from the actions instituted against you at the suit of Plummer & Co., for 2400*l.*”

Notice had been given at the time of pleading, as required by the act of Parliament, of the defendant’s intention to dispute the trading, act of bankruptcy, &c.

No proof, however, was offered on the part of the plaintiff to support the commission, but the plaintiff’s attorney was called as a witness, and from his evidence the following circumstances appeared:—An order was made for holding the defendant to bail for 1450*l.*—and repeated unsuccessful endeavours were made to arrest him—his attorney had several interviews with the plaintiff’s attorney, in which he proposed, that the defendant should admit all the necessary proofs, and try the question on the merits, if the plaintiffs would waive their right to hold him to bail. The plaintiffs agreed to this, and a meeting was appointed for the 29th of September, 1825. The defendant came alone to the meeting, and, on the plaintiffs’ attorney saying, that he expected to see his attorney with him, he replied, that it was not necessary; his attorney had advised him of what had taken place. It was then stated to him, that his attorney had proposed that he should admit the conversion of the bills, to the amount which

*168] the *plaintiffs sought to recover; and also every other fact, except the merits, provided the plaintiffs would waive the holding him to bail; and he was asked if that proposition was made with his authority. He replied, that it was; and he was ready to carry it into effect; as the only question he wished to try was, whether he was liable to any, and what extent, under the undertaking he had given; and that he was not very anxious even about that, as he had received an indemnity from a Mr. Claughton. The undertaking was then produced to him, and he was asked if it was his handwriting, and he said it was. He was then asked whether he received the bills, and he said he did. He was then asked whether he procured Legh’s discharge, as mentioned in the memorandum, and he replied, that he did not. He was then asked if he restored the bills to Mr. Legh, and he said he did not. He was then asked what he had done with them, and his reply was, that he had applied them to his own use. He said he should enter a common appearance, and added, “I suppose you will get a verdict against me, and I will assign over Claughton’s bond, which I hope will satisfy you.” A common appearance was entered on the 17th of October, 1825.

Russell, Serjt., for the defendant, objected, that this evidence was not sufficient to dispense with the proof of the bankruptcy. The title of the assignees, and the fact of the bankruptcy, are not mere formal matters, but must be considered as a part of the merits.

TINDAL, C. J. I should have said so, if it had depended upon a general expression about the merits; but, according to the evidence, the defendant goes on to say what he means by the merits; and he says, that the only part of the merits he wanted to try was, whether he was liable under the agreement.

*169] *Russell*, Serjt. Then I submit further, that the *admission he made was not such an admission as that he might not afterwards go from it, if he pleased.

TINDAL, C. J. Perhaps that might be true, if he had not received some benefit from what he did; but he has received such benefit, because he was allowed to enter a common appearance, and was not required to give bail.

C. Cresswell, also for the defendant. It must be taken, that what was not

expressed by the plaintiffs' attorney in the conversation, was not one of the things to be admitted, and nothing was said about the title of the assignees. The plaintiffs cannot complain of being taken by surprise, as notice was regularly given before plea pleaded, according to the provisions of the statute.

TINDAL, C. J. If any unfair advantage had been taken of the defendant, or he had been taken by surprise, one should look with great jealousy at communications made to the attorney of the opposite party. But it seems that a communication had proceeded from his own attorney, and that the interview took place in consequence of that communication; and the only effect of the conversation against the defendant is, that he has admitted a *prima facie* case against himself; but he is at liberty to avail himself of any defence upon the merits. He may show that the bills were worth nothing; or make any other defence that he is in possession of.

Wilde, and Spankie, Serjts., and Comyn, for the plaintiffs.

Russell, Serjt., and C. Cresswell, for the defendant.

[Attorneys—*Honworth, and Martin.*]

*BURBIDGE and Another, Assignees of WHITE, a Bankrupt, [*170
v. WATSON. Dec. 17.

A bankrupt assigned all his property to two trustees, one of whom was the petitioning creditor, who was present at the execution of it by the bankrupt, and executed it himself, but not in the presence of any attorney or solicitor:—Held, that this was not such an assignment, as, being communicated to a creditor of the bankrupt, before the receipt by him of money from the bankrupt, would enable the assignees to recover such money as money received after and with notice of an act of bankruptcy.

ASSUMPSIT for money had and received to the use of the plaintiffs, as assignees. Plea—*Non assumpsit.*

The plaintiffs sought to recover a sum of between 40*l.* and 50*l.*, on the ground that it was received by the defendant from the bankrupt, after and with notice of an act of bankruptcy.

The act of bankruptcy relied on was an assignment (a) made by the bankrupt of all his property to two trustees, named Atkinson and Pusey.

With respect to the receipt of the money, the facts were as follows:—The defendant issued a writ against the bankrupt on the 14th of January, and it was sent that day to the under-sheriff, with directions for the arrest. The assignment was also executed on the 14th of January. On the 19th of January, the accountant to the commission saw the defendant, and told him of the assignment. On the 29th of January the writ was returned "*cepi*," and an account of the debt and costs was sent to the under-sheriff on the 30th, who, on the 31st remitted *the amount to the defendant's attorney. The commission was [*171 issued on the 10th day of February.

Hutchinson, for the plaintiff, cited Allanson v. Atkinson. (b)

(a) The 3d section of the 6 Geo. 4, c. 16, enacts, That if any trader "shall depart this realm, or, being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestered, or taken in execution, or make, or cause to be made, either within this realm, or elsewhere, any fraudulent grant, or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made, any fraudulent surrender of any of his copyhold lands or tenements, or make, or cause to be made, any fraudulent gift, delivery, or transfer, of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy."

(b) 1 M. & S. 583. "Where R., a tradesman, being arrested at the suit of the defendant upon a *ca. sa.*, placed goods in the hands of the Sheriff's officer, to raise money upon them,

The accountant under the commission was called to prove notice to the defendant of the act of bankruptcy before the receipt of the money; (a) and he stated, on his cross-examination, that the assignment was prepared by him, and executed at the office of Atkinson, one of the trustees, Pusey, the other trustee, being present, and executing it, but no attorney or solicitor was present at the execution either by the bankrupt or the trustees. (b) It appeared that Pusey was the petitioning creditor under the commission.

Wilde, Serjt., for the defendant, submitted, that the plaintiffs must be non-suited. The instrument put in is no act of bankruptcy. It is an assignment by the bankrupt of all his property to Atkinson and Pusey. To make the assignment an act of bankruptcy it must have been executed so as to be a legal fraud; and Pusey, the petitioning creditor, being one of the trustees, and present when it was executed, it is quite clear that it cannot be so considered.

Hutchinson, for the plaintiffs, contended, that although it might not be an act of bankruptcy which would support the commission, yet it was a sufficient act to support the action against the defendant.

TINDAL, C. J. It is perfectly clear, that this is not such an act of bankruptcy as would support the commission; and I think it is such an act, that the petitioning creditor is estopped from setting it up for any purpose, as it was evidently concerted between him and the bankrupt. I am of opinion that the plaintiffs must be called. (c) Nonsuit.

Storks, Serjt., (d) and Hutchinson, for the plaintiffs.

Wilde, Serjt., and Smith, for the defendant.

[Attorneys—D. Jones, and Phipps.]

who, accordingly, pledged them; and five weeks afterwards paid over the amount to the defendant:—Held, that the assignees of R., who had committed an act of bankruptcy before the arrest, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer, and although the money paid to the defendant was not the identical money raised by the pledge."

(a) The 82d section enacts, "That all payments, really and bona fide made, or which shall hereafter be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments, really and bona fide made, or which shall hereafter be made to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

(b) Vide section 4, of the 6 Geo. 4, c. 16, which is as follows: "And be it enacted, that where any such trader shall, after this act shall have come into effect, execute any conveyance or assignment by deed, to a trustee or trustees, of all his estate and effects, for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader. Provided, that such deed shall be executed by every such trustee, within fifteen days after the execution thereof by the said trader, and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper, published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor."

(c) The case of *Tope v. Hockin*, 7 B. & C. 101, decides, that "the creditors at large of a bankrupt, represented by the assignees, cannot avail themselves of an act of bankruptcy prior to the one on which the commission is founded, but which the petitioning creditor could not take advantage of on account of being privy to it, inasmuch as the assignees derive all their rights, under the commission, from the petitioning creditor." See also *Tappenden v. Burgess*, 4 East, 230.

As to bona fide transactions after an act of bankruptcy, but without notice of it, see the case of *Hill and Another, Assignees, v. Farnell*, 9 B. & C. 45; and see also the case of *Tucker and Another, assignees of Hickman, a bankrupt, v. Barrow, Gent., one, &c.*, 3 C. & P. 85, and 1 M. & Malk. 137.

(d) The learned Serjeant was at Westminster, in the Cambridge Toll Case.

FEARN v. LEWIS. Dec. 16.

In *assumpsit* on a bill of exchange, to which the statute of limitations was pleaded, two letters were given in evidence to take the case out of the statute. They were written by the defendant to a third person; the first of them stated that he should be much obliged to the plaintiff to *withdraw his outlawry*, and added, that as soon as his situation would allow, *the plaintiff's claim, with others*, should receive that attention that, as an honourable man, he considered them to deserve. The second letter expressed his readiness to do anything to satisfy the plaintiff and all his creditors. No evidence was given of any proceeding to outlawry having been taken with respect to the debt the plaintiff sought to recover. It was held, at *Nisi Prius* (the trial being since the 9 Geo. 4, c. 14), that, under these circumstances, the letters were not sufficiently connected with that debt to entitle the plaintiff to a verdict, and he was nonsuited; but leave was given for a motion to set aside the nonsuit. On application afterwards to the Court of Common Pleas, the nonsuit was confirmed, a *rule nisi* for setting it aside being *refused*.

ASSUMPSIT on a bill of exchange for 800*l.* against the defendant, as acceptor. Pleas—The general issue and the statute of limitations.

To take the case out of the operation of the statute, two letters, written by the defendant, were put in. They were not addressed to the plaintiff, but to a gentleman residing *in London.(a) The first was dated on the 22d of April, 1828, and was as follows:— [*174]

"My dear Sir,—I am this day favoured with yours, and feel obliged by the offer of assistance to settle with Mr. Fearn, and in the present stage of my affairs I can only say I shall feel much indebted to Mr. Fearn to *withdraw his outlawry*, and, as soon as common decency and my situation will allow, *Mr. Fearn's claim, with others, shall receive that attention that, as an honourable man, I consider them to deserve*, and which has been, and is, *my intention to pay them*. I cannot conclude without saying I must be allowed time to arrange my affairs. If I am proceeded against, every exertion of mine will be rendered abortive, and the Bench or France must be my destination; and any one who reads my father's will will soon see how I am situated."

The second letter was dated the 12th of July, 1828, and was in these terms:—

"Dear —,—I beg leave to apologize for any neglect in regard to answering your kind letter, and assure you Mr. M. was desired to call on you when in town, and to arrange with Mr. Fearn; however, as it now appears he has not done so, allow me to say, I am *ready and willing to do anything and everything to satisfy Mr. Fearn and all my creditors*; and my only regret is, that, by the way my father has left me, I am totally unable to do more than give up (which I do by deed) almost the whole of my income to my creditors, and no man can do more; and if I am put into prison, not one penny will my creditors ever receive. For the truth of this I refer you now to my father's will, and declare to you I am not worth one pound; and this place is mine to live in, but everything is left as heir-looms, and cannot be touched by any process; and if *my person is laid hold of I never mean to put in bail, but surrender. [*175] Let me hear from you, and I am," &c.

Wilde, Serjt., for the defendant, contended, that the plea of the statute must prevail, as no intention to hold out any promise of present payment was to be inferred from the letters. He cited *Tanner v. Smart*,(b) and *A'Court v. Cross*.(c)

Bompas, Serjt., on the same side. A man may say I do not mean to bind myself, I will do all that an honourable man ought, but at present I am not in a situation to pay. The case of *Eyton v. Bolt*, 4 Bing. 105, is an authority to

(a) In the case of *Peters v. Brown*, 4 Esp. N. P. C. 46, Lord Kenyon held, that an acknowledgment to a stranger was sufficient.

(b) 6 B. & C. 603, that case decides, that a defendant's saying "I cannot pay the debt at present, but will pay it as soon as I can," is not sufficient to take a case out of the statute of limitations without proof of his ability to pay.

(c) 3 Bing. 329. Defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it!"—Held, not such an acknowledgment as would revive the debt against a plea of the statute of limitations.

show, that where a defendant is applied to for the payment of a debt barred by the statute, and says, that he should be happy to pay it if he could, the ability to pay must be shown in order to entitle the plaintiff to recover.

TINDAL, C. J. The provision of the new statute is, that no acknowledgment by words shall deprive a party of the benefit of the statute of limitations, unless such acknowledgment is in writing and signed by the party. Looking at the acknowledgment in the present case, I must see, either, by the largeness of it, that it specifically amounts to this debt, or, from other circumstances, as the wording of it, that it applies to it.

*176] *Taddy*, Serjt. I submit, that they must show that *there is some other claim to which the letters can apply. In the case of *Tanner v. Smart*, it is settled, that a bare acknowledgment is sufficient. The case of *A'Court v. Cross* does not apply, because there was a distinct negation of any promise. But here, there is nothing to repel the acknowledgment of the debt. The last letter states, that a person had been desired to call and arrange with the plaintiff, and then goes on to say, that he, the defendant, is ready and willing to do anything and everything to satisfy Mr. Fearn and all his creditors; and the subsequent part about the deed and his father's will, &c., is no more than a statement of his circumstances, and does not amount to any refusal to pay.

Moody, on the same side. The terms of the letter do not refer to any particular debt, but they mention *the claim* of Mr. Fearn, and that will apply to whatever claim Mr. Fearn may set up. The case of *Frost v. Bengough*(a) is precisely in point.

TINDAL, C. J. In that case the acknowledgment was of a general nature, not applying to any particular claim. Here my difficulty is, that, in the first *177] letter a claim is spoken of, as to which Mr. Fearn had proceeded to *outlawry. It is you who are to take the case out of the statute, and I think you should show the fact of the outlawry. If I could look at this record and see that there was any appearance of a proceeding to outlawry, I should know how to deal with it, but I cannot see that this can apply.

Moody. Taking the letters together, the acknowledgment applies to the claim, and the outlawry may only apply to a part of that claim, and is not of necessity to be taken to apply to the whole, particularly as one of the letters speaks of Mr. Fearn as a *creditor*. The letter also is dated before the record, and there may have been a previous *intention* to proceed to outlawry, which may have been afterwards abandoned.

TINDAL, C. J. I think you must show a little more specifically and pointedly that this acknowledgment applies to the particular debt. The new statute says, that "no acknowledgment or promise by word only shall be deemed sufficient evidence of a *new or continuing contract*," &c., "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." It becomes, therefore, the duty of the party who is to take a case out of the statute to show affirmatively that the acknowledgment applies distinctly to the debt. I do not think I ought to call upon the defendant in this case to show negatively that there is any other debt to which it can apply. This, after the best consideration I can give to the subject, is the conclusion at which I think I ought to arrive, and, therefore, I shall direct the plaintiff to be nonsuited; but I will give him leave to move the Court to have a verdict entered for him.

Nonsuit, with leave to move.

(a) 8 J. B. Moore, 108, and 1 Bing. 266. Where, in an action on a promissory note, the defendant pleaded the statute, and the plaintiff gave in evidence, as proof of acknowledgment within six years, a letter from the defendant to him, stating, that "business called him to L., but should he be fortunate in his adventures, the plaintiff might depend on seeing him at R.;" otherwise that he must arrange matters with the plaintiff as circumstances would permit; and the defendant did not show that there were any other matters besides the promissory note to which this letter could refer:—Held, that it was properly left to the Jury to decide whether such letter referred to the matter of the note, and was a sufficient acknowledgment to take the case out of the statute; and the Jury having found in the affirmative, held, that the verdict was conclusive."

**Taddy*, Serjt., and *Moody*, for the plaintiff.

Wilde, and *Bompas*, Serjts., for the defendant.

[*178]

[Attorneys—*S. W. Young*, and *Winter, Williams & Co.*]

ON the first day of the ensuing Hilary term, *Taddy*, Serjt., moved, pursuant to the leave given, but the Court Refused a rule.(a)

(a) For the account of the motion, &c., see 3 Moore & Payne's Reports.

COURT OF KING'S BENCH.

ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1829.

BEFORE LORD TENTERDEN, C. J.

WYNNE v. CROSTHWAITE.(a) Jan. 20.

In debt on a bond, purporting to be for a loan on *respondentia* on an East India ship, to which two sets of special pleas were pleaded, one set alleging usury, and the other illegality under the statute 19 Geo. 2, c. 37, s. 5, it was left to the Jury to say whether it was a *bona fide* transaction on *respondentia*, or a loan on usury:—Held, on motion for a new trial, the Jury having found for the plaintiff, that the question was sufficiently left to the Jury, and that it was not necessary, notwithstanding the provisions of the 19 Geo. 2, to leave it as a distinct question for them to say, whether the money was or was not lent to a person who had no interest in or goods on board, the vessel:—*Semble*, that pleas of illegality under the above statute should contain an allegation that the money borrowed was not intended to be laid out in the purchase of goods to be put on board the vessel.

DEBT, on a bond for 6,000*l.*, with counts for money lent, money paid, &c.

*The defendant cravedoyer of the bond, which was set out as follows:—"Know all men, by these presents, that we, John Wilkinson, second officer of the Lowther Castle, in the service of the Honourable East India Company, John Crosthwaite and James Hullock, of Fenchurch Street, and Richard Pain, of Lloyd's Coffee House, London, Gentlemen, are held, and firmly bound, to Peter Wynne, of Paternoster Row, London, Stationer, in the sum or penalty of 6,000*l.*, of good and lawful money of Great Britain, to be paid to the said Peter Wynne, or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves jointly and separately, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents sealed with our seals. Dated this 1st day of March, in the sixth year of the reign of our Sovereign Lord George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, defender of the faith, and in the year of our Lord 1825. "Whereas, the above-named Peter Wynne, on the day of the date above written, advanced and lent unto the said John Wilkinson, John Crosthwaite, James Hullock, and Richard Pain, the sum of 3,000*l.* upon the goods, merchandise, and effects laden and to be laden on board the good ship or vessel called the Lowther Castle, now riding at anchor in the River of Thames, outward bound to China, and whereof Thomas Baker is commander. Now, the condition of this obligation is such, that if the said ship or vessel do and shall,

(a) Omitted, *ante*, p. 120.

with all convenient speed, proceed and sail from and out of the said River of Thames on a voyage to any port or place, ports or places in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, and from thence do and shall sail, return, and come back into the said River of Thames, at or before the end and expiration of thirty-six calendar months, to be accounted from the day of the date above written, and there to end her said intended voyage (the dangers and *casualties of the seas excepted); And if the said *180] John Wilkinson, John Crosthwaite, James Hullock, and Richard Pain, they or either of them, their or either of their heirs, executors, or administrators, do and shall, within thirty days next after the said ship or vessel shall be returned to the said port of London from her said intended voyage, or at and upon the end and expiration of the said thirty-six calendar months, to be accounted as aforesaid (which of the said times shall first happen), well and truly pay or cause to be paid unto the said Peter Wynne, or to his executors, administrators, or assigns, the full sum of 3,660*l.* of lawful money of Great Britain, together with 45*l.* of like money *per* calendar month for each and every calendar month, and so proportionably for a greater or lesser time than a calendar month, for all such time and so many calendar months as shall be elapsed and run out of the said thirty-six calendar months over and above twenty calendar months, to be accounted from the day of the date above written; or if in the said voyage, and within the said thirty-six calendar months to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, men-of-war, or any other casualties, shall unavoidably happen; and the said John Wilkinson, John Crosthwaite, James Hullock, and Richard Pain, their heirs, executors, or administrators do and shall, within six calendar months next after such loss, well and truly account for (upon oath if required), and pay unto the said Peter Wynne, or to his executors, administrators, or assigns, a just and proportionable average on all the goods and effects of the said John Wilkinson carried from England on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said John Wilkinson shall acquire during the said voyage for or by reason of such goods, merchandises, and effects, and which shall not be unavoidably lost; then the above-written obligation to be void and of none effect, else to stand in full force and virtue. *181] If the said ship Lowther Castle should return to *the port of London previous to the expiration of eighteen calendar months from the date of this bond, this bond is not to become payable till the expiration of the said eighteen months, say seventeen months and thirty days grace."

The defendant pleaded—*first, non est factum.*

He *secondly* pleaded that the bond " was made and entered into by him under and by virtue and in pursuance of a certain corrupt contract made between the plaintiff and him, for the payment of usurious interest on the sum of 3,000*l.* lent and advanced by the plaintiff to him. The *third* plea stated the bond to have been given in pursuance of a corrupt agreement made between the plaintiff and *all the obligors* named in the bond, for the payment of usurious interest upon the same sum.

The *fourth* plea stated, that the bond was made in pursuance of a certain unlawful contract and agreement made after the 1st day of August, 1746,(a)

(a) The statute 19 Geo. 2, c. 37, s. 5, enacts, that from and after the 1st day of August, 1746, all and every sum and sums of money to be lent on bottomry or at *respondentia*, upon any ship or ships belonging to any of his Majesty's subjects, bound to or from the East Indies, shall be lent only on the ship or on the merchandise or effects laden or to be laden on board of such ship, and shall be so expressed in the condition of the bond, and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at *respondentia* as aforesaid, shall recover more on any assurance than the value of his interest on the ship, or in the merchandises or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or in the merchandises or effects laden on board, doth not amount to the full sum or sums he hath borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship, or merchandises laden thereon, with lawful interest for the same,

between the *plaintiff and defendant, whereby it was agreed, "that the said plaintiff should lend and advance unto the said defendant the sum of 3,000*l.*, and should forbear and give day of payment thereof unto the said defendant, for the time and times, upon the terms and conditions in the said condition of the said writing obligatory mentioned; and further, that the said John Wilkinson and the said defendant, and the said James Hullock and Richard Pain, who, at the time of making the said unlawful contract and agreement, *had not shipped* or laden any wares or merchandises in or on board the said ship or vessel, in the said condition of the said writing obligatory mentioned, on the said intended voyage therein mentioned, *should not*, nor should any or either of them, *load or ship* any wares or merchandises in or on board of the said ship or vessel on her said intended voyage; and that, for the purpose of securing unto the said plaintiff the repayment of the said principal sum, &c., they, the said John Wilkinson, &c. should make and execute, &c., the said writing obligatory." The plea then averred, that the money was lent, and the bond in fact executed, delivered, and received in pursuance of such unlawful agreement. It concluded with the following allegations:—"And the said defendant in fact further saith, that no wares or merchandises whatsoever of or belonging to the said John Wilkinson, or to the said defendant, or to the said James Hullock or Richard Pain, were ever laden or intended to be laden in or on board of the said ship or vessel in the said condition mentioned, on the said intended voyage therein mentioned; and that *no risk or hazard* could therefore possibly happen to the said plaintiff of losing the said sum of 3,000*l.*, or any part thereof; and that the sealing or delivery of the said writing obligatory, in the said first count mentioned, was *a mere colourable pretext and unlawful device*; and that the said contract or agreement was *an unlawful wagering contract*, made and entered into contrary to the form of the statute in such case made and provided, whereby and by force of the *same statute, the said supposed writing obligatory in the said first count mentioned, was and is wholly void in law," &c. &c. [*182]

The *fifth* plea stated the contract to be, that the plaintiff should lend and advance the money to Wilkinson, *for the use of the defendant*.

The *sixth* plea stated, that, at the time of making the contract, &c., the said ship or vessel called the Lowther Castle, being then a ship belonging to certain liege subjects of our Lord the King, was then riding at anchor in the River Thames, and bound on a voyage to the East Indies and China; and that *the said defendant was not* then in any respect *interested in any goods, wares, merchandises, or effects of the said John Wilkinson, shipped, or intended to be shipped*, on board of the said ship or vessel, of all which, &c., the said plaintiff *had notice*; and thereupon, after the 1st day of August, 1746, &c., it was corruptly, and against the form of the statute, &c., agreed by and between the said plaintiff and the said defendant, that, &c. [The plea here set out almost in the same terms a similar contract to that mentioned in the fourth plea, with similar averments of the lending of money and the sealing and delivering of the bond, and then proceeded as follows]:—"And the said defendant in fact further saith, that *the said ship or vessel did afterwards proceed upon and perform* the said last-mentioned intended voyage, and returned in good safety to London, to wit, &c., at, &c. And that *no goods, wares, merchandises, or effects of the said John Wilkinson*, were at the time of the making of the said last-mentioned corrupt and unlawful agreement, nor at any time after during the continuance of the same voyage, or before the return of the said ship or vessel from the said voyage to London, *shipped in or on board of the said ship or vessel in which he the said defendant was in any respect interested*; and the said defendant in fact further saith, that the said last-mentioned contract was an unlawful wagering contract, and the said writing obligatory *a shift and contrivance, under colour and pretence of a loan upon respondentia* upon the goods and effects of the said John Wilkinson, shipped in and on board of the said ship or [*183]

together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandises be totally lost."

vessel in the said last-mentioned voyage, to secure to the said plaintiff more than at the rate of 5l. per cent," &c. &c.

The seventh plea stated, that, at the time, &c. "no goods, wares, merchandises, or effects of the said John Wilkinson, or of the said defendant, or either of them, were shipped, or intended to be shipped, on board of the said ship or vessel;" of which fact it averred that the plaintiff had notice. In other respects it was similar to the sixth plea.

The eighth plea was similar to the sixth and seventh, except that it only averred that, at the time, &c., no goods, &c., of the said defendant were put on board, or intended to be put on board.

The ninth plea contained no averment as to the goods put, or intended to be put, on board.

The tenth plea was *nil debet* to the money counts.

The plaintiff, in his replication, joined issue upon the pleas of *non est factum* and *nil debet*. He then replied to each of the first five special pleas, that the writing obligatory, in the declaration mentioned, was made by the defendant for a good and lawful consideration, and not in pursuance of the corrupt and unlawful agreement, or for the purposes mentioned in it.

The replication to the seventh plea, in addition to the statement that the bond was given for a lawful consideration, contained these words, "and without the said plaintiff having notice that no goods, wares, merchandises, or effects of the said John Wilkinson, or of the said defendant, or either of them, were, at the time of the making of the said supposed agreement, shipped, or intended to be shipped, on board of the said ship," &c. The replications to the eighth and ninth pleas were similar to those to the second, third, fourth, fifth, and sixth.

The defendant joined issue upon these replications.

From the evidence on the part of the plaintiff, it appeared that Wilkinson, *185] the first obligor in the bond, was, as *stated there, second officer of the Lowther Castle, a ship in the East India Company's Service; that Crosthwaite, the defendant, the second obligor in the bond, was the managing owner of that vessel; that the plaintiff, who was a stationer in the city, was in the habit of lending, on *respondentia*, extensively to persons in the East India trade only; that the defendant, and Hullock, the third obligor in the bond, had made an affidavit, in which it was stated, that they and Wilkinson were part owners of the vessel in question; that when the bond was executed, the plaintiff signed a check for 2,992l.; and that an insurance had been effected by him on the bond as a *respondentia* bond. It was admitted, that the ship sailed on her voyage and returned in about fourteen months.

From the cross-examination of one of the plaintiff's witnesses, it appeared that the plaintiff had, previously to the transaction in question, discounted for Crosthwaite, the defendant, and for Pain, in conjunction with him—Pain was the fourth obligor in the bond.

Brougham, for the defendant. The defence in this case is twofold—First, that usury was contemplated—and Secondly, that, if it was a loan on *respondentia*, it was not such as the law allows. With respect to the first, if parties intending merely to lend and borrow have recourse, as a shift, to a pretence of *respondentia*, it is usury, and the bond is void. In the case of *Lord Chesterfield v. Janson*, (a) Lord Hardwicke says: "Though money is to be advanced upon a risk, which, upon a contingency, may be totally lost, it is still a loan of money, and all the books treating of bottomry call it money lent on bottomry. Besides, this is plain, by the express words of the statute 11 Hen. 7, c. 8, which shows they understood that an Adventure might be inserted in a contract of release; and it

*186] *is observable, that this, if real and fair, exempted it from the laws of usury, though at that time all kind of usury or taking interest was unlawful. By the law of England, therefore, the insertion of a contingency will not of itself prevent a contract's being a loan. Consider the result of the cases cited on the statute of

(a) 2 Ves. 125, the judgment of the Lord Chancellor is at page 152 of the 4th edition by Belt, in 1818.

usury, which I will not repeat, but only deduce proper and natural inferences from them—*First*, if there is a loan on contingency, in consideration whereof a higher interest than the law allows is contracted for forbearance, if the risk goes only to the interest or premium, and not to the principal also, though real and substantial risk is inserted, it is contrary to the statute, because the money lent is not in hazard, but safe in all events, and no regard is then had whether the contingency is real or colourable, as appears from what Doddridge, J., says in *Roberts v. Tremayn*, who, by the way, takes it for granted that such a loan may be with us on contingency. Next, if the contingency extends to both, and there is a higher rate than the law allows, *regard is had whether a bona fide risk is created by the contingency, or whether only colourable; for, if so, courts of law hold it contrary to the statute, because it is an evasion to get out of the statute, which is prohibited by the law itself.*"

Now, it appears, in the present case, from the evidence of one of the plaintiff's witnesses, that the plaintiff had been lending money before to Crosthwaite, and from this it may be inferred, that the advance was a loan to him at usurious interest, and not really a transaction of *respondentia*.

In the second view of the case, the question will be under the 5th section of the 19 Geo. 2, c. 37, (a) whether Wilkinson was really the borrower or not. I shall prove *that Crosthwaite was the borrower, and that Wilkinson was [187 merely a nominal party. Crosthwaite neither had, nor intended to have, any goods on board. But even if the loan was in reality to Wilkinson, it would not be legal; for I shall show that he had not any interest in the cargo, because he had sold his privilege of stowage, which belonged to him as an officer of the ship. The question of usury will be a question for the Jury. The question upon the statute will resolve itself into a matter of law.

Lord TENTERDEN, C. J. At present it strikes me that there is only one question, *viz.* whether this was usury. The ground of the prohibition is, that it is a colour.

On the part of the defendant, it was first proved by a clerk in the house of Lees & Co., who were the defendant's bankers, that he received payment from Perring & Co. on behalf of the firm of Wilkinson & Crosthwaite (Crosthwaite being then the only surviving member), of the check for 2,992*l.*, which the plaintiff had signed. It appeared that the Mr. Wilkinson who had been in partnership with Crosthwaite was an uncle of the Mr. Wilkinson who executed the bond.

Mr. Pain, the fourth obligor, was then called as a witness, he was objected to on the part of the plaintiff, on the ground that he was liable to an action for contribution.

On the part of the defendant, it was answered, that the money having been proved to have passed into the hands of the defendant, he could not maintain any action for contribution in respect of it.

To this it was replied, on the part of the plaintiff, that the argument on the part of the defendant assumed the very point in issue, *viz.* that the defendant was the only principal, whereas that fact was not established, and on the face of the bond they all appeared as principals.

*Lord TENTERDEN, C. J. In general, a co-obligor cannot be a witness. [188 My difficulty is, that it is not at present established that the defendant was the principal. The money might have got into his hands from any of the other parties. I think that the witness must be released.

Proper releases were then produced, and the witness was allowed to be examined. He stated, that he had known the defendant nearly thirty years, and the plaintiff for several years previous to the year 1825; and that, on several occasions, before that time, the plaintiff had discounted bills drawn by him (the witness) and accepted by the defendant; that, in the month of February, 1825,

(a) *Vide ante*, p. 181, where that section is set out, the title of the act is, "An act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon."

he applied to the plaintiff to discount for the defendant; but he declined, saying, that his surplus funds were reserved for loans on *respondentia*; that, on the next day he went again to the plaintiff by desire of the defendant, and asked him, referring to the Lowther Castle, if he would lend to the defendant on *respondentia*; that the plaintiff said he would not, as the defendant was not an officer of the ship, but that he would lend to the captain or any officer of the ship, and take the defendant's security; and that he afterwards told the plaintiff that Wilkinson was to be the principal in the bond.

Mr. Wilkinson was then called and examined. (a) He stated, that he was under obligations to the defendant, and that, in consequence, at his solicitation, he consented to enter into a joint bond with him, and went to the plaintiff, whom he had never seen before, for the purpose of executing it; that nothing was said about his privilege of stowage (which he parted with about that time, but whether before or after he could not tell); that he had not given any authority to Pain or the defendant, or anybody else, to borrow money of the plaintiff for him; that he did not receive any of the money, but a check was laid upon *189] to him, as he trusted to the defendant; that he had not any goods on board the ship; and that he did not know, till after his return, either that the bond was a *respondentia* bond, or that Pain had anything to do with the transaction.

The only other witness called for the defendant was Mr. Hullock, and from his evidence it appeared that the defendant had the whole of the money for which the bond was given; that Pain became bankrupt in September, 1825; that the plaintiff applied to the defendant, who was Pain's principal creditor, and told him that he should prove under Pain's commission; that the defendant objected, and said, he ought not to prove, as the ship had not arrived, and the bond was not due; to which the plaintiff replied, that if he got a dividend there would be so much less for the rest to pay; that a day or two afterwards the plaintiff went again to the defendant, who gave him two acceptances, to the amount of 600*l.*, which were subsequently paid in lieu of his proving against Pain's estate.

On the part of the plaintiff it was contended, that he was entitled to recover, as he could not know whether goods were shipped or not; and that the Legislature had only provided, that, when no goods were shipped, the borrower should not be allowed to take advantage of his own fraud. As to the question of whether it was a *respondentia* transaction, it was contended, that the dealing between the plaintiff and defendant, with respect to the bills of exchange, showed clearly, that both of them so considered it.

Lord TENTERDEN, C. J., in his summing up, said—This is an action on a bond purporting to be on *respondentia*. The question is, whether it was really a loan *190] at *respondentia*, or was merely a loan to which the form of a **respondentia* was given as a colour to enable the plaintiff to get more than legal interest. On the face of the instrument it purports to be on *respondentia*. If the ship had been lost, the money would have been lost too. It is of no consequence to the plaintiff, whether Wilkinson allowed Crosthwaite to have the money afterwards or not. If you think it was *bonâ fide* a transaction on *respondentia*, then you will find your verdict for the plaintiff; if on the contrary, then you will find for the defendant. Verdict for the plaintiff.

Scarlett, A. G., Campbell, Wightman, and J. H. Lloyd, for the plaintiff.

Brougham, and Chitty, for the defendant.

[Attorneys—Davis & Richardson, and Sandys & Son.]

In the ensuing Hilary Term, Brougham moved for a new trial, on the ground that his Lordship ought to have kept the two questions of usury and illegality

(c) This witness was released, as was also Mr. Hullock, who was examined after him.

under the statute as distinct questions : and that he should have left it to the Jury to say, whether the loan was actually to Crosthwaite or not, as that was material under the act of parliament.

But the Court refused to grant a rule, being of opinion that, in effect, the direction to the Jury was sufficient ; and—

PARKE, J., expressed a doubt as to whether the defendant's pleas went far enough to raise the question of illegality under the statute, there being no averment that it was not intended to *lay out the money borrowed in the purchase of goods to be put on board the ship.*

*SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1830. [191]

BEFORE LORD TENTERDEN, C. J.

CARTER v. WARNE and Another. Feb. 15.

Trustees under an assignment for the benefit of creditors, are entitled (like assignees under the Bankrupt and Insolvent Debtors Acts), to a reasonable time to ascertain whether property held under a lease by the debtor, can be made available for the benefit of the creditors or not, but if they act in such a way as to render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will, by that conduct, make themselves personally liable for the payment of rent and performance of covenants.

THE declaration stated, in substance, that on the 24th March, 1824, by indenture between the plaintiff and one James Edwards, the said plaintiff demised to the said James Edwards, his executors and administrators, a house and garden at Twickenham, for twenty-one years, from the 29th of September then next ensuing, at the rent of 20*l.*, payable quarterly ; and that Edwards covenanted to pay the rent and to keep the premises in repair. It then averred, that, on the 16th of May, 1829, *all the estate*, right, title, interest, term of years yet to come and unexpired, property, profit, claim, and demand whatsoever, of him the said James Edwards, of, in, and to the said demised premises, with the appurtenances, by assignment thereof then and there made, *legally came to and vested in the said defendants* ; whereupon and whereby the said defendants then and there entered into and upon all and singular the said demised premises, with the appurtenances, and became and were thereof possessed, and continued thereof possessed, until and upon the 29th day of September, 1829, &c. The declaration then claimed two quarters' rent, as having become due from the defendants since the assignment ; and also complained that the defendants did not repair, but that, on the contrary, the premises, with the fixtures, &c., had become ruinous, dilapidated, &c.

The defendants pleaded, *first*, that the indenture was not Edwards's deed. *Secondly*, that all the estate, &c., of Edwards in the premises did not vest in them by assignment, as alleged in the declaration. And *thirdly* *(protesting that the estate of Edwards did not come to them by assignment), that they did keep the premises in repair. [192]

The plaintiff was the owner of a house and garden at Twickenham, and in March, 1824, granted a lease of them for twenty-one years, at the rent of 20*l.*, to a person named Edwards, who carried on the business of a shoemaker on the premises, till the month of May, 1829, when he became embarrassed, and executed an assignment to the defendants, Mr. Warne and Mr. Deeds, who were two of his principal creditors (*inter alia*), of *all his personal estate and effects whatsoever, and all his estate and interest therein*. To hold the same upon trust for the benefit of his creditors generally. This assignment was executed by Edwards, by the defendants, and by several other creditors of Edwards, and contained a release of all claims and demands upon him. No mention was made

of the lease in the assignment. Edwards paid his rent up to Christmas, 1828, and continued in possession till the 23d of May, 1829, which was about a week after the date of the assignment. On the 2d of June following, a sale took place of the stock in trade, and the house and shop fixtures; and the catalogue stated, that, on the same day, would be sold "the valuable lease of the premises, with commanding shop, held for an unexpired term of sixteen years from Lady-day preceeding, at the low rent of 20*l. per annum*," and described the sale as to be made without reserve, under a deed of assignment for the benefit of creditors, and contained a list of fixtures, *some of them belonging to the plaintiff*, and some of them put up by Edwards. The lease was bought in, but *all* the fixtures, &c., were sold by direction of the defendants, and the premises were much injured by their being taken down and carried away. After this, the attorney for the defendants paid the plaintiff 5*l.* for a quarter's rent up to Lady-day, and tendered him the lease and the key of the premises, which the plaintiff refused to accept.

*193] Lord TENTERDEN, C. J. (in summing up), said—The *question in this case is, whether the defendants have made themselves personally liable? The assignment by Edwards is in very general terms; *viz.* of all his personal estate and effects whatsoever, and all his estate and interest therein. It appears that the lease was not, at that time, thought of, nor does it appear to have been mentioned in the deed. It has been decided, (a) that assignees of a bankrupt are entitled to a reasonable time to see whether they can, with propriety, take to the leasehold property of the bankrupt; and I consider that trustees, under an assignment for the benefit of creditors, are to be considered as in the same situation in this respect with assignees of a bankrupt. But if they go beyond what is necessary to ascertain the value of the interest, and act as if the property were vested in them, in that case they will be personally liable. The particulars of sale describe the property thus, "The valuable lease of the premises with commanding shop, held for an unexpired term of sixteen years, from Lady-day last, at the low rent of 20*l. per annum*;" and there is also a catalogue of the fixtures. Now, the question for you will be, did the defendants act in such a way as to render the premises of less value to the landlord, and did they act as if the property were vested in them; if you think they did, then you will find your verdict for the plaintiff; but if you should think that they did nothing more than attempt to ascertain whether a profit could be made of the lease or not, then you will find your verdict for the defendants.

Verdict for the plaintiff, 40*l.*

Law, and *Platt*, for the plaintiff.

F. Pollock, for the defendants.

[Attorneys—*Carter & G.*, and *Lawrence*.]

(a) *Vide* Copeland v. Stephens, 1 B. & A. 593; Turner v. Richardson, 7 East, 335; and Hastings v. Wilson, Holt's N. P. C. 290. The same also is the case with respect to assignees under the Insolvent Debtors' Act, *vide* Lindsay v. Limbert, 2 C. & P. 526.

*194] ADJOURNED SITTINGS IN LONDON AFTER HILARY TERM, 1830.

BEFORE LORD TENTERDEN, C. J.

ROACH v. THOMPSON. Feb. 19.

The plaintiff had accepted a bill for 148*l.*, for the accommodation of T., who gave it to N. for a particular purpose; N. borrowed 10*l.* of the defendant, and gave him this bill as a secu

city. This sum of 10*l.* was repaid by N., but the bill was not given up, and the defendant endorsed it for value to K., who, when it was dishonoured, caused both the plaintiff and T. to be arrested, and the plaintiff paid the amount of the bill, and the costs of both arrests:— Held, that the plaintiff was entitled to recover the amount of the bill from the defendant, but not the costs of the two arrests.

ASSUMPSIT for money lent, money paid, and upon an account stated. Plea—General issue.

It appeared, from the evidence of Mr. Nias (who had been released by the plaintiff), that, on the 3d of August, 1827, a person, named Tanner, had drawn the following bill of exchange:—

“London, August 3d, 1827.

“Twelve months after date, pay to my order, 143*l.* 8*s.* 3*d.*, value received.”

This bill was accepted by the plaintiff for the accommodation of Tanner, and endorsed by the latter. It further appeared, that Tanner had given this bill to Mr. Nias, for the purpose of retiring some acceptances of Tanner that were overdue; however, the bill was not so applied, and Mr. Nias stated, that, in the month of September or October in that year, he wrote a letter to the defendant, stating that he was going into the country, and wished for a loan of 20*l.*, and he enclosed this bill in the letter as a security for the loan. The defendant, who had had previous transactions with Mr. Nias, did not advance the 20*l.*, but sent a sum of 10*l.*, which was afterwards repaid by Mr. Nias, in account, he omitting to ask for the return of this bill. Some time after this, the return of the bill was asked for, and the defendant then said, *that Mr. Knight had [*195 received it from him (the defendant), and had given value for it. After this, both the plaintiff and Tanner were arrested at the suit of Mr. Knight, and the plaintiff paid both the amount of the bill, and the costs of the two arrests; all of which he now sought to recover back from the defendant.

Campbell, for the defendant, asked the Jury to discredit the evidence of Mr. Nias, and to consider whether this bill had not been sent by Mr. Nias to the defendant as a payment, and not as a security for 10*l.*

Lord TENTERDEN, C. J. (in summing up.) The simple question here is, whether this bill was deposited by Mr. Nias, as a temporary security for an advance of 10*l.*, that sum having been since repaid, for if Mr. Nias deposited it as a security for a particular sum, and that sum has been repaid, the defendant would not be entitled to hold this bill as against the plaintiff. This being a bill that did not belong to Mr. Nias, the defendant could not hold it as against the owner, for any more than he actually advanced upon it; and though he might have a right to hold it as against Mr. Nias, for the amount of an unsettled account, yet he cannot hold it as against the owner, for more than he actually advanced upon it. Another circumstance worthy of notice is, that this bill has never been endorsed by Mr. Nias. If he sent it as a security for a small advance, he probably would not endorse it; but, if he had sent it as a satisfaction of a debt, he would most likely have put his endorsement upon it. If you are of opinion *that this bill was placed in the hands of the defendant as a deposit for this loan of 10*l.*, and that that sum has been repaid, the defendant had no right to retain this bill, and the plaintiff is entitled to a verdict. But, I think that the plaintiff cannot recover the costs of the arrests against the defendant, because this bill being in the hands of Mr. Knight, as against whom the present plaintiff had no *defence, he ought to have paid the amount of the bill as soon as it be- [*196 came due.

Verdict for the plaintiff, for the amount of the bill only, without the costs of the two arrests.

Scarlett, A. G., and Chitty, for the plaintiff.

Campbell, for the defendant.

[Attorneys—Nias, and Popkin.]

CURTIS and Others, Assignees of COLLINSON, a Bankrupt, v.
WHEELER. Feb. 20.

Replevin—Avowry for rent in arrear. Plea, that the tenant had let other property to the defendant, at a larger rent, and that it was agreed that the two rents should be set off against each other; and that, in consequence, a larger sum was due to the tenant than the sum distrained for by the defendant. Replication, denying this agreement:—Held, that, on these pleadings, the defendant was entitled to begin.

REPLEVIN. The defendant, in the first avowry, stated, that he had demised certain rooms to Thomas Ellison Collinson, at a rent of 35*l.* a year, and that he distrained for such rent, it being in arrear. There were four other avowries, stating the tenancy in different ways.

To each of these avowries there were three pleas in bar: *viz.* *first*, *non tenuit*; *secondly*, *riens in arrear*; and *thirdly*, a special plea, stating that Thomas Ellison Collinson had let certain other rooms to the defendant, at a rent of 42*l.* a year, and that it had been agreed between them, that the rent of 42*l.* should be set off against the supposed rent in the avowry mentioned; and this plea went on to state that a greater sum was so due to Thomas Ellison Collinson, than the supposed arrear in the avowry mentioned.

Replication, denying the agreement to set off the one rent against the other, and also denying that any part of the rent of 42*l.* a year was in arrear. This replication was repeated *verbatim* to each of the five pleas, that stated an agreement to set off rent against rent.

*[197] *Denman*, for the plaintiffs, claimed the right to begin, *stating that the agreement to set off rent against rent was an affirmative on the plaintiffs.

Scarlett, A. G., for the defendant. This is an action of replevin, and setting up this agreement merely amounts to saying that there is nothing in arrear; and, besides, in an agreement to set off rent against rent, both parties are actors.

Lord TENTERDEN, C. J. I cannot distinguish between the action of replevin and any other action.

Scarlett, A. G. In every case of replevin, the plaintiff would always state something imaginary to make the defendant deny it, and so get the right to begin. In the case of an avowry, it is always best for the defendant to begin and show his case.

Denman. Your Lordship will not say that the statement of this plea is imaginary? The form of action makes no difference; and if there is an affirmative issue on the plaintiff, he must begin.

Lord TENTERDEN, C. J. If these plaintiffs prove the agreement as stated in the third plea, and that the rent there mentioned is in arrear, there is an end of the action. I am afraid to make distinctions in actions; and if there is any affirmative on the plaintiff, I think he ought to begin.

Denman, for the plaintiffs, then stated his case, and called witnesses, who proved the agreement to set off rent against rent, as stated in the plea; but they also proved, that the bankrupt and the defendant had agreed that this rent, so due from the latter to the former, should be set off against a surgeon's bill; the effect of which was, to leave *the rent due from the bankrupt

*[198] to the defendant still in arrear.

Verdict for the defendant.

Denman, and *Chitty*, for the plaintiffs.

Scarlett, A. G., and *Carrington*, for the defendant.

[Attorneys—*D. Richardson*, and *T. Dimes*.]

See the case of *Williams*, Administrator of *Williams*, v. *Thomas*, *post*, p. 233. *Fowler v. Coster*, 3 C. & P. 463; *Cooper v. Wakley*, *Id.* 474; *Cotton v. James*, *Id.* 505.

TEESDALE and Others v. ANDERSON. Feb. 20.

A party published a prospectus for the publication of a county map and gazetteer, stating that the map would contain "the exact limits of every parish and township in the county." The defendant agreed to take a copy of each. They were published, and there were lines on the map denoting the boundaries of townships, but no distinct lines to show the boundaries of those parishes which consisted of several townships:—Held, that the map was not according to the prospectus, and that the defendant was not bound to take the map, although, by reference to the gazetteer, it could be ascertained what townships were in each parish.

ASSUMPSIT. The declaration stated, that the defendant had agreed to purchase a map of Yorkshire, and also a gazetteer of that county; but although the same were offered to him, he refused to accept them. Plea—General issue.

It appeared that the defendant had been shown a prospectus of a map and gazetteer of the county of York, and that he had signed his name in a book as a subscriber for a copy of each. The prospectus contained the following statement respecting the map: "It will contain not only, as usual, the boundaries of the three ridings, and their divisions into separate wapentakes, but also the exact limits of every parish and township in the county." It was proved that the defendant refused to take the map, alleging that it did not show the boundaries of the parishes. The map was produced, and it had, in fact, no distinct lines denoting the boundaries of parishes, but there was a dotted line showing the boundary of each township.

Cross, Serjt., for the defendant. The parish of Halifax consists of many townships, and no man, by looking at that map, could ever tell what are the boundaries of that parish. [*199]

F. Pollock, for the plaintiff. If a parish consists of several townships, they can be found in the gazetteer, which states in what parish each township is; and so the boundaries of the parish may be made out. The map and gazetteer are sold together, to explain each other.

Lord TENTERDEN, C. J. You have described in your prospectus, that this is to be done by the inspection of the map. No man can tell, by looking at this map, what are the boundaries of the parish of Halifax. There are the boundaries of the townships marked, but there are no lines for the boundaries of parishes. Now, according to the prospectus, I am to know by looking at the map what are the boundaries of each parish. The townships and the parishes ought to have been marked with different sorts of lines. The map does not agree with the prospectus. The plaintiff must be called. Nonsuit.

Campbell, and *Comyn*, for the plaintiff.

Cross, Serjt., and *Archbold*, for the defendant.

[Attorneys—*Lloyd*, and *Lever*.]

See the case of *Paton v. Duncan*, 3 C. & P. 336.

*DALY and Another v. SLATTER. March 3. [*200]

A banker in London, corresponding with a banker abroad, has the same right, with respect to English bills of his correspondent becoming due while in his hands, as an English banker has with respect to his customer in England; and therefore, if such a bill be dishonoured, he may send it, when returned, to his correspondent abroad; but *semble*, that if the foreign correspondent be afterwards in London, in possession of the bill, he ought not to send it again to the London banker, but should himself give notice of dishonour to the party who endorsed it to him.

ASSUMPSIT on a bill of exchange for 315*l.* 6*s.* 10*d.*, dated the 2d of February, 1829, at four months from the date, drawn by the defendant on and accepted by Henry Tebbs, made payable to the drawer's order, and endorsed by him.

The plaintiffs, Messrs. Daly & Wilkinson, who were bankers at Paris, dis-

counted the bill in question for a person named Magrath, on the 28th of March. Magrath had an account with their house, on which, at the time of the trial, the balance was in their favour to more than the amount of the bill. On the 5th of June, when the bill became due, it was presented at Barnett & Co.'s, where it was made payable, by a clerk of Glyn & Co., who were the London correspondents of the plaintiffs' house. It was returned to them unpaid on the 6th, which was a Saturday; on Monday the 8th, which was the next foreign post-day, Glyn & Co. sent it to the plaintiffs at Paris, and on the morning of the 17th, it was received again by Glyn & Co., having been *put into the twopenny-post, on the evening of the 16th, by the plaintiff Daly, who was at that time in London.* Glyn & Co. sent it by post on the 17th, to Parsons & Co. at Oxford, who, on the morning of the 18th, presented it to the defendant, a bookseller in that city, and informed him of its having been dishonoured.

It appeared that Magrath did not endorse the bill, but that the plaintiffs, notwithstanding, having received it from Glyn & Co., on Thursday, the 11th of June, took the principal part of Friday, the 12th, to make inquiries after him, and were in consequence too late to send the bill by the post of that day, but sent it in the Ambassador's bag, which leaves Paris about an hour and a half after the mail. The post that left Paris on Friday the 12th, arrived in England *201] on Monday the 15th. There was no post from Paris *after Friday the 12th, until Monday the 15th. It was proved to be a three days' post from Paris to London.

In addition to this evidence, a witness was called, from whose statement it appeared, that Tebbs had accepted the bill at the request of a person named Rose, who was the defendant's brother-in-law; and that a conversation took place between Tebbs and the defendant, in which Tebbs said, that he had never received any value for the bill, and it was a hard thing on him that he should be required to pay it. The defendant said, he had understood from Rose, that he (Tebbs) owed Rose 1400*l.* Tebbs denied this, and said, that, on the contrary, Rose was indebted to him. He added, that he could not and would not take up the bill. The defendant expressed his surprise at hearing that Tebbs had not received value for the bill, and stated that he was unable to take the bill up, as he had been a loser by Rose himself. It was stated that Rose had left the country.

On this state of facts, *Campbell*, for the plaintiffs, contended, *first*, that the defendant was not entitled to notice at all, because he had no effects in the hands of Tebbs, the drawee, and was told by him, that he would not take up the bill; and, therefore, he was not damaged by the absence of notice; and *secondly*, that the notice was in time, supposing him entitled to receive it. The bill having arrived at Paris on Thursday the 12th, the plaintiffs were entitled to the whole of Friday, to make inquiry after Magrath, of whom they received it; and there being after Friday no post till the following Monday, the 19th would be the day on which notice should be received at Oxford; and it appeared that, in fact, it was received as early as the 18th.

Scarlett, A. G., for the defendant. I submit, *first*, that the notice was clearly not in time. There was no endorsement by Magrath upon the bill; therefore, he was not *liable upon it. The first endorsement is the defendant's and the second the plaintiffs' to Glyns. The plaintiffs were not entitled to keep the bill a day to inquire after Magrath, as he had endorsed it, and they could not bring any action against him. They should have put it in the post on Friday the 12th, and then it would have arrived at Oxford on the 17th at latest. But, supposing they had the right to inquire after Magrath, then, as they received the bill on the morning of Thursday, the 11th, they should not have kept it later than post time on Friday the 12th. In addition to this, it appears that the bill was in the hands of the plaintiff Daly, in London, on the 16th, and he should have sent it to Oxford himself, and not have sent it again to the house of Glyn & Co. His doing so is proof that Glyn & Co. were his agents; and, if so, they should have sent notice to the defend-

ant in the first instance, and not have sent the bill to Paris again. They held the bill as the plaintiffs' *agents*, and had no duty cast upon them of giving the plaintiffs notice of dishonour. Then, if I am right in this, the question will come to be considered, whether the defendant was entitled to any notice at all. I am not aware of any case precisely similar to the present. But it is clear from the whole of the conversation, that Rose was the person who, if he had not absconded, would have been the party to take the bill up. It seems that the defendant had no idea that Tebbs, the acceptor, had not had value for the bill. To dispense with notice, the drawer must be aware that he himself is the person to take the bill up. If he is not so aware, he is entitled to notice. And, although a man may not actually have funds in the hands of the acceptor, yet, if he has a credit on him, he is entitled to notice.

Kelly, on the same side. The presumption is, that the bill arrived in London on Monday, the 15th, because it appears that there was only an hour and a half's delay in starting, and there would not be more than that delay in delivery.

**Campbell*. It is clear that the bankers in London had a right to send the bill to Paris, when they had received notice of its dishonour. [203

Lord TENTERDEN, C. J. I have no doubt about that point. I consider Messrs. Glyn & Co. to be in the same situation with respect to these plaintiffs, as a banker in England is with respect to his customer. I think it will come to this, whether you were bound to send notice by the post on the Friday.

Campbell. It must be admitted, that if Magrath had endorsed the bill, we should have had the Friday; for if Magrath had had the notice on Friday, he would not have been obliged to write on that day; and there is no difference between the time for his writing, after receiving the notice, and our writing after not being able to find him. Although Magrath has not put his name on the bill, yet, he was, in fact, endorsee, and would have his remedy upon it.

The argument was then continued by the counsel on both sides, and the cases of *Brett v. Levitt*, 13 East, 213, *Walwyn v. St. Quintin*, 1 Bos. & P. 652, and *Turner v. Leach*, 4 B. & A. 451, were referred to.

Lord TENTERDEN, C. J., said—Perhaps, as this may be a rule of general importance, I had better not give any opinion upon the general question, but allow the facts to be turned into a case.

The counsel agreed to this suggestion, and his Lordship afterwards observed— I have already intimated, that I thought Messrs. Glyn & Co. were, at first, the correspondents of the plaintiffs' house, and that they had a right, in the first instance, to *send the bill to them at Paris; but there is a great [204 deal of difference between that and the question whether the plaintiff Daly had a right to increase the agency afterwards, by sending the bill to them again, when he was himself in London.

His Lordship further added—I must say, that I, for one, wish that no exception had ever been made in the general rules with respect to notice. There can be no general rule which will not in some cases be productive of hardship; but if, on every inconvenience which arises in a case, you make that case an exception to the general rule, it introduces such great laxity, that at last you come to have no settled rule at all.

Verdict for the plaintiffs, subject to a case.

Campbell, and *R. V. Richards*, for the plaintiffs.

Scarlett, *A. G.*, and *Kelly*, for the defendant.

[Attorneys—*Gates*, and *Ager & B.*]

JONES and Others v. TURNOUR. *March 4.*

The declaration in an action on a bill of exchange stated it to have been drawn by one Hannah P., accepted by the defendant, and endorsed by the said Hannah P. to the plaintiffs. The drawing and endorsement appeared to be in this form:—*Per pro.* H. P., John P. A clerk of the plaintiffs proved that the drawing and endorsement were of the handwriting of a Mr. John P., whom he *understood* to be the son of a Mrs. P., whom he had *never seen*, but with whose house the house of his employers had dealings, and that he had seen bills drawn and accepted in the same form as the bill in question, some of which bills had been paid. The plaintiffs, on this evidence, had a verdict; and a rule nisi for a new trial having been obtained, an affidavit, in consequence of an observation made by the Lord Chief Justice, was produced, stating the name of the party to be Hannah P., and that the bill was drawn by her authority. And the Court of King's Bench, on the whole evidence, *refused* to make the rule for a new trial absolute.

ASSUMPSIT. The declaration stated, that one Hannah Pickersgill drew her bill of exchange for 137*l.*, value received in wine, which the defendant accepted, and that the said Hannah Pickersgill, to whose order the bill was made payable, afterwards endorsed it to the plaintiffs.

In addition to proof of the defendant's acceptance, a clerk of the plaintiffs *205] was called, who stated, on his *examination in chief, that the handwriting of the drawing and endorsement, which were both "*Per pro.* H. Pickersgill, John Pickersgill," was that of one John Pickersgill, who was a wine merchant. He added, that the plaintiffs were also wine merchants; that their house had dealings with the house of Mrs. Pickersgill; and that he had seen bills drawn and endorsed, and accepted, in the same form and handwriting as the drawing and endorsement of the bill in question. On his cross-examination, he said, that he never saw any person called Hannah Pickersgill, and only knew, from what John Pickersgill had told him, that there was any such person in existence. He understood from John, that she was his mother.

Payne, for the defendant, submitted that the averment in the declaration, that Hannah Pickersgill endorsed the bill to the plaintiffs, had not been proved. To establish this, it was necessary, *first*, to show that *there was such a person* as Hannah Pickersgill in existence; and *secondly*, that she either endorsed the bill herself, or that the person who did so, did it with her authority. Now the plaintiffs had failed in establishing both these things, and therefore they were not entitled to recover. He further stated, that there was good reason for taking an objection, because, as the bill appeared upon the face of it, and was stated in the declaration to be for value received in wine, and the person proved to be a wine merchant was Mr. John Pickersgill, it might happen that, after a recovery upon this bill of Hannah Pickersgill's (no proof of consideration having been given, or being necessary), another demand for wine might be set up by John, supported by proof of the delivery of that for which the bill was given, without its being in the power of the defendant to show that the two demands were founded upon one transaction.

Lord TENTERDEN, C. J. I am of opinion that, as against this defendant, it *206] must be taken to be an endorsement *by Hannah Pickersgill. If the defendant had intended to dispute the existence of any such person, or of any such authority to draw, he should not have accepted the bill in that state. But he having done so, I consider that his acceptance admits the authority to draw in that particular form; and the endorsement being in the same form and handwriting, it may be taken to have been made with the same authority.

Verdict for the plaintiffs, 143*l.*

Scarlett, A. G., and *Platt*, for the plaintiffs.

Payne, for the defendant.

[Attorneys—*Gale*, and *Hodgson & Burton*.]

In the ensuing Easter Term, *Payne* moved for a new trial. He contended,

on the authority of *Smith v. Chester*, 1 T. R. 654, and *Robinson v. Yarrow*, 7 Taunt. 455, that the acceptance of a bill drawn by procuration, admits only the authority to draw, and does not admit the authority to endorse; and, with respect to the statement of the witness, of his having seen other bills drawn in the same form, he submitted that it was not evidence without the production of them.

LORD TENTERDEN, C. J., was of opinion that, upon a question of authority, the statements were receivable in evidence; and thought the verdict was sustained by the proof at the trial.

BAYLEY, J., intimated an opinion that the proof was sufficient in all respects, except that there was no evidence of the name's being Hannah, the bill being merely "H." and the witness having spoken only of Mrs. Pickersgill.

*LORD TENTERDEN, C. J., said, that no questions were asked at the trial, about the name being other than Hannah, which he considered [*207 ought to have been the case, if it had been intended to rely upon that circumstance. His Lordship, however, was of opinion that a rule to show cause should be granted; but directed that it should not go into the new trial paper; and added, that if the other side produced an affidavit that the real name was Hannah, the rule would eventually be discharged.

ON the last day of the same Term, the rule came on to be argued, and an affidavit (in consequence of the observation made by the Lord Chief Justice) was produced on the part of the plaintiff, sworn by John Pickersgill, in which he stated that he was the son of Hannah Pickersgill, and managed her business for her, and drew, accepted, and endorsed bills for her; and that the bill in question was drawn and endorsed by her authority.

On the part of the defendant, this affidavit was objected to, as not bearing upon the proper question; viz. whether the plaintiffs were in a situation, *at the trial*, to have proved their allegation, that the drawing and endorsement were by Hannah Pickersgill, if the objection, that H. did not prove it, had been more distinctly relied on at that time. It was admitted that if the affidavit had been made by the *witness who was called at the trial*, it might have varied the case. The objections made when the rule was obtained, were also repeated.

But the Court, upon the whole, thought there was sufficient *prima facie* evidence to support the plaintiff's case, and, therefore, directed the

Rule to be discharged.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER
HILARY TERM, 1830. [*208

BEFORE LORD TENTERDEN, C. J.

ATKIN v. ACTON. March 16.

A clerk and traveller, hired by the year, assaulted his employer's maid servant, with intent to ravish her. Held to be good cause for his dismissal without any notice.

Semble, that a person dismissed under such circumstances is *not* entitled to wages even for the time during which he has served.

ASSUMPSIT. Plea—General issue, a set-off, and a tender of 14*l*.

The action was brought to recover the sum of 130*l*., for wages, &c., under the following agreement which had been entered into by the plaintiff and defendant.

"Jonathan Atkin agrees to serve Mr. Acton as clerk and traveller, at 80*l.* a year; Mr. Atkin to live and board in the house. Dated the 16th of December, 1828."

From the evidence, it appeared that the plaintiff came into the service of the defendant, on the 27th of January, 1829. He continued with him some time acting as traveller, and sometimes as clerk, but frequently, when in town, sleeping away from his master's house, till Friday the 27th of March, 1829; on which day, having been away all night, he came to the house about 10 o'clock in the morning, there being nobody in the house but the servant maid, his master having gone into the country, after waiting some time for the purpose of seeing him. He ordered his breakfast, and took some liberties with the servant when she brought it in. In consequence of this, as soon as she had done so, she went up stairs and locked herself in her own room. The plaintiff soon after came up to the door, and said if she did not unlock it he would break it open. The postman knocking at the door, the plaintiff went away, and the servant went down stairs. As soon as the letters had been taken in he followed her, and put his handkerchief into her mouth to prevent her crying out, and *209] attempted to take very indecent liberties with her, *when, after a hard struggle, he was interrupted by the ringing of the bell, and the defendant's porter came into the house. The servant told the porter what had happened, and the plaintiff immediately went away, and did not return till the Saturday morning. The master and mistress came home on the Friday evening, and the servant informed them also; and the next morning, when the plaintiff came, the defendant charged him with having made a violent attack upon the servant, and said he would not keep him any longer, but stated that he would pay him for the time he had been with him, and offered him the sum of 13*l.* 14*s.* 2*d.*; the money produced consisted of a five pound note and nine sovereigns, making 14*l.* there was no change. The plaintiff said that he would not take it. It also appeared, that an interview took place on the 11th of April, between the plaintiff and defendant, and the clerk of the plaintiff's attorney, in which the defendant had said that it did not suit his purpose, and he would not keep the plaintiff, and gave as a reason that, on the last journey, he had not got orders enough to pay his expenses; not saying anything at that time about his conduct to the maid.

Scarlett, A. G., for the defendant, contended that the conduct of the plaintiff to the maid servant was a sufficient ground of dismissal.

Campbell, for the plaintiff, argued that the real ground of dismissal was, the defendant's finding that the profits did not cover the expenses, and that the other was only an after-thought. He also contended, that the tender was not proved, as the exact sum was not produced at the time.

Lord TENTERDEN, C. J. Assuming that the effect of the agreement is, that it creates a hiring for a year, yet, if the plaintiff misconducted himself in the way described, the defendant had a right to discharge him, and was not compellable, according to my judgment, to pay him any *money at all; at all *210] events, he was not liable to pay him any more than for the time during which he actually served, which will bring it round to the demand on the counts for work and labour. With respect to the tender, it appears to me that it has been proved. The plaintiff refused to take the money offered, and as the sum was mentioned, and he would not accept it, I think it is quite sufficient, because his objection was not, that the sum put before him was not the precise amount offered, but his answer shows that he was not willing to take the money at all. It therefore was not necessary for the defendant to get the sovereign changed so as to offer the precise sum. Verdict for the defendant.

Campbell, and *Channell*, for the plaintiff.

Scarlett, A. G., and *Steer*, for the defendant.

[Attorneys—*Taylor*, and *Younger*.]

ANDERDON v. BURROWS, M. D., and two Others. *April 26.*

A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody and confine him, unless he is satisfied, from those statements, that such a step is necessary, to prevent some immediate injury from being done by the individual, either to himself or to other persons; and, if access cannot be had for the purpose of examination, application should be made to the Lord Chancellor, that the party may be taken up under his authority.

TRESPASS for assaulting and imprisoning the plaintiff, and forcing him to go along certain public streets. Plea—Not guilty.

The plaintiff was a gentleman of property, but of very parsimonious and eccentric habits, who resided in a small house in York street, Lambeth. The first defendant was the eminent physician, well known in that part of the medical profession whose practice is confined to cases of insanity; and the facts, as far as related to the assault and imprisonment, were as follows:—About 6 o'clock in the evening of the 1st of November, 1829, two men (who were *the defendants Haggard and Shirreff) went to the plaintiff's [*211 house, and having induced him to come out, laid hold of him, and told him that he must go with them. He refused to go, and called to some of his neighbours who were passing to come to his assistance. They did so, and questioned the men as to their authority. They said they had authority, and produced a paper purporting to be signed by Dr. Burrows, which paper was in the following form:—

“By order of Mr. Oliver and Mr. James Anderdon, I authorize the bearer to take charge of Mr. Freeman Anderdon, and confine him to his own house, No. 4, York street, Lambeth, he being insane.”

The bystanders remonstrated with the men, who said they did not want to use the plaintiff ill, but would take him and use him as a gentleman,—they would take him either to his own house or to an hotel. He refused to go anywhere with them, and resisted their attempts to move him. Upon which, one of them who carried a bag, told him that if he was not quiet, they had implements in that bag which would make him so. He got away, by a violent effort, from the man with the bag, and the watch coming up, all the parties went before the constable; and the matter, being investigated, ended in the plaintiff's being set at liberty, and the two men committed to the watch-house, to be taken before the magistrate next day. The bag was examined by the constable, and found to contain screws, straps, a strait-waistcoat, &c. On the investigation next day, at Union Hall, Dr. Burrows admitted that the men had acted by his authority, and that he had never seen the plaintiff; and in answer to a question by Mr. Chambers, he said, that it was usual to act if the friends applied, without having seen the person.

Scarlett, A. G., in stating the case of the plaintiff said, that although the assault and imprisonment were clearly illegal, and there must be a verdict at all events for the *plaintiff, yet he would not contend that, if a man be [*212 really insane, his friends, who interfere for his protection, should be made to pay heavy damages; and, therefore, if it should appear, upon the examination of the witnesses, that the plaintiff was really insane, he would admit that it would go very greatly to mitigate the damages. He was therefore prepared, on the part of the plaintiff, to go at once into the question of sanity or insanity.

Various witnesses were then examined on the part of the plaintiff, among them his landlord, and many of his neighbours, carrying on different trades, who all described him as a person of very good understanding, capable of conversing sensibly upon different topics, and shrewd in making bargains and purchases. From their cross-examination on the part of the defendants, it appeared, that the plaintiff was a person of rather peculiar habits; that he kept no servant in his house, that he bought his own food, carried his pie to the baker's, went with his beard of a week's growth, dug large holes in his front garden, went often without a neckcloth, and wore a large flapping straw hat in the month of

November. It appeared also, that he had purchased pictures to the amount of nearly 4000*l.*, and it seemed that some large purchases made just before, gave the alarm to his friends, and induced them to make the application which ended in his arrest. The pictures, however, were proved, at the trial, to be worth more than he had given for them.

Denman, for the defendants, in his address to the Jury, contended, that Dr. Burrows had acted for the best, and with perfect good faith in the matter. I allow that the verdict must pass for the plaintiff. I have only to make out that Dr. Burrows acted from honourable motives as a medical man ought, and then the very smallest damages will be sufficient. The only issue between us is, *213] whether the damages ought to be trifling or considerable? It will *be sufficient for me to show that there was such a *prima facie* case as to make that *inquiry and examination* proper, for which alone the steps taken were resorted to. Some course of a preliminary nature must be adopted, and if a respectable family make the representation, what is a medical man to do? I submit that there was such a case of suspicion, as made it perfectly proper and unavoidable to do what Dr. Burrows has done. It seems, that for several years this plaintiff has been in the habit of conducting himself in a most extraordinary way. The absence of intercourse with his family is in itself a very strong circumstance. But in addition to this, there is the evidence of his manner of living. His house, his habits, his dress, his companions, all were totally unworthy of his education and rank in society. From his retired habits, there was no other mode which Dr. Burrows could adopt. There never was any intention of taking him to a mad-house. The intention only was, to put him under the care of his parent and family, in order that Dr. Burrows might have an opportunity of examining him. On the whole it appears, that there was a clear case of suspicion, rendering it advisable for the family to make inquiries, and, in order to do that, to employ the defendant, Dr. Burrows.

Lord TENTERDEN, C. J. (in summing up), said—It is admitted on both sides that your verdict must be for the plaintiff, and the only question is, as to the amount of damages which you are to give; and with respect to this point, it is material to consider that the plaintiff was taken on suspicion of his being insane. Certainly the course taken by Dr. Burrows has been such as cannot by law be justified. He ought not to have sent two men with such instruments as these appear to have been sent with, merely upon statements made by relations, unless those statements were such as to satisfy him that those steps were necessary to prevent the party from doing some immediate injury either to himself or others. *214] From the statement made *by Dr. Burrows, when the parties were before the magistrate, it seems that it is usual, on the application of the family, to act in this manner. I confess I am sorry to hear it so said, for it certainly is not right; and although there may be difficulty in getting access to a party labouring under insanity; yet, the proper course is, if access cannot be obtained, to apply to the high authority, which has cognisance over such matters, to get the party taken up in order that he may be examined. The question for your consideration, under all the circumstances, will be, whether there was reasonable and probable cause for the plaintiff's brothers to consider him as insane, and whether, in consequence of their so considering him; they made the application to Dr. Burrows: for if such should be your opinion, probably you will not go very high in your estimate of the damages.

Verdict for the plaintiff—Damages 500*l.*

Scarlett, A. G., Brougham, Adolphus, and Platt, for the plaintiff.

Denman, Law, and Alderson, for the defendants.

[Attorneys—*Truohitt, and Freshfield & Son.*]

*OXFORD SPRING CIRCUIT. 1830. [*215]

BEFORE MR. JUSTICE LITLEDALE, AND MR. BARON BOLLAND.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE LITLEDALE.

REX v. HEARNE, COTTON, and COX. Feb. 27.

If a witness give evidence of a conversation with a prisoner, in which that prisoner says something implicating another prisoner, the witness, in giving his evidence, must not omit the name of such other prisoner and say "another person," but must give the conversation exactly as it occurred, and the Judge will tell the Jury that it is not evidence against such other prisoner.

INDICTMENT for horse-stealing. A witness on the part of the prosecution was giving evidence of a conversation which took place between the prisoner Cotton and himself in the absence of the other prisoners. In this conversation, the prisoner Cotton stated, that Cox assisted him in the stealing of the horse.

Maclean, as counsel for the prisoner Cox, suggested that as this conversation was not evidence against his client, the witness ought to be directed to omit the name of Cox, and merely say another person.

LITLEDALE, J. The witness must mention the name. He is to tell us what Cotton said, and if he left out the name he would not do so. Cotton did not say "another person," and the witness must give us the conversation just *as it occurred; but I shall tell the Jury that it is not evidence against [*216 Cox.

The witness repeated the conversation, stating the name of Cox where it had occurred.

Verdict, Cotton and Cox, Guilty; Hearne, Not Guilty.

Shepherd and Secker, for the prosecution.

Talfourd, Carrington, and Maclean, for the respective prisoners.

[Attorneys—*Barton*, for the prosecution, *Vines, Compigne & Darvall*, and *Weldon*, for the respective prisoners.]

See the case of *Rex v. Clewes*, *post*, p. 221; and *Rex v. Fletcher*, *post*.

BEFORE MR. BARON BOLLAND.

REX v. WILLIAM BIRKET. March 1.

If on an indictment for stealing "one sheep," it appear that the animal stolen was under a year old, the prisoner must be acquitted, as he ought to have been indicted for stealing "one lamb." If a ewe is stolen, it must be so called in the indictment; and so a lamb must be called a lamb; and the term sheep is proper only where the animal stolen is a wether.

INDICTMENT for stealing "one sheep," the property of Henry Benwell.

The prosecutor, in answer to questions put by the Learned Baron, said that the stolen animal was under a year old, and that he should call it a lamb-eg.

BOLLAND, B. Upon this evidence I must direct an acquittal. In this

indictment, the animal in question ought to have been called a lamb. Animals of this kind are lambs, and not sheep till they are a year old. There was a case lately before the twelve Judges, in which a man had been indicted at the Old Bailey, and tried before Mr. Justice J. Parke, for stealing "one sheep," *217] and it *appearing at the trial that the animal was a ewe, the twelve Judges held, that the prisoner could not be convicted, as the statute used the words, "ram, ewe, sheep," &c., and that if the animal was in fact a ewe, the indictment must so describe it; and it was not enough to use the general term sheep. If a ewe is stolen, it must be called a ewe in the indictment; and so a lamb must be called a lamb; but a wether should be described as a sheep.

Verdict—Not Guilty.

Rigby and Maclean, for the prosecution

[Attorney—*Roberts*.]

By the stat. 7 & 8 Geo. 4, c. 29, s. 25, it is enacted, "that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the carcass, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

REX v. CHARLES MORRIS JONES. *March 1.*

If a prisoner, who was in the service of the prosecutor, steal a quantity of lace in several pieces, the pieces together being above 5*l.* in value, and bring them all out of his master's house at the same time, this is a capital offence, although it be shown that the prisoner had the opportunity of stealing the lace by a piece at a time, and that no one of the pieces was worth 5*l.*

THE prisoner was charged with stealing in a dwelling-house sixty-eight yards of lace, of the value of 13*l.*, the property of George Shepherd.

It appeared that the prisoner, on the 18th of October, 1829, sent the lace (which was in several distinct pieces) from Abingdon to London, in a parcel by the coach; and it was also proved, that he was the shopman of Mr. Shepherd, and that no one piece of lace was worth 5*l.*

*218] *Talfourd*, for the prisoner, suggested, that, *in favorem vite*, the learned Baron would take it that the pieces of lace might have been stolen at different times.

BOLLAND, B. I cannot assume that to have been so, we find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once; and unless you can give some evidence to show that it was stolen at different times, you do not raise your point; but even if you did, I should think it would be of no avail, for on the last Winter Circuit, it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this person did; for it was shown that he stole the articles one or two at a time, and under value, but that he carried them out of his master's house all together, the articles amounting in all to more than 5*l.* value; and Mr. Baron Garrow, after much consideration, held, that, as the articles were all brought out of the prosecutor's house together, it was a capital offence.

Verdict—Guilty.

Shepherd, and *Carrington*, for the prosecution.

Talfourd, for the defence.

[Attorneys—*Frankum*, and *Weedon*.]

BEFORE MR. JUSTICE LITTLEDALE.

REX v. SADLER and Others. *March 1.*

In a criminal case, a person, who is present in Court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpoenaed. An indictment for stopping a way is a criminal case for this purpose.

INDICTMENT for stopping up a footway. Plea—Not Guilty. This indictment had been removed by *certiorari*, and came down to be tried as a *nisi prius* record.

*To prove the obstruction of the way, *Curwood*, for the prosecution, [*219 called a person named Hayward, a son of one of the defendants. The witness did not answer when called, but he was in Court, and would not answer.

On this being stated, *Taunton*, who was for the defence, said, that the witness had not been subpoenaed, and therefore was not bound to answer.

Curwood, for the prosecution. That is so in civil cases, but this being a criminal prosecution, the witness must answer if he is in Court, even though he may not have been subpoenaed.

Taunton. Though this is, in point of form, a criminal prosecution, yet it is really nothing more than a mode of trying whether persons have a right to go over the lands of the defendants.

LITTLEDALE, J. I think that this must be taken to be a criminal prosecution, and that the witness is bound to answer, although he has not been subpoenaed.

Mr. Hayward was then sworn and examined.

Verdict—Not Guilty.

Curwood, and *Carrington*, for the prosecution.

Taunton and *Shepherd*, for the defence.

[Attorneys—*Frankum*, and *Hedges*.]

*OXFORD ASSIZES.

[*220]

BEFORE MR. JUSTICE LITTLEDALE.

REX v. THOMAS BEEZLEY. *March 5.*

If counsel for the prosecution call a witness, whose name is on the back of the indictment, but do not examine him, and such witness be examined by the prisoner's counsel, any question put by the prosecutor's counsel after this must be considered as a re-examination, and therefore the prosecutor's counsel cannot ask anything that does not arise out of the previous examination by the prisoner's counsel.

INDICTMENT for murder. On the part of the prosecution, several witnesses were called, and at the end of their examination, *Justice*, who was for the prosecution, closed his case; but Mr. Justice Littledale said, that as there were four more witnesses on the back of the indictment, the counsel for the prosecution ought to call them, to give the prisoner's counsel an opportunity of cross-examining them. *Justice* accordingly called them all, but did not ask either of them any question. One of them, on being cross-examined by *Ludlow*, Serjt., stated many facts in the prisoner's favour.

Justice, for the prosecution, wished to ask this witness some questions relative to something that had occurred at an earlier part of the day on which the deceased was killed.

Ludlow, Serjt., objected that this did not arise out of the cross-examination *LITTLEDALE*, J. These questions cannot be put. This is strictly a re-examination, and no question can be asked which does not arise out of the cross-examination. If the prosecutor's counsel does not choose to examine in chief, he cannot be allowed to lie by and see what the prisoner's counsel does in cross-examination, and then enter into a fresh examination of the witness, as to new facts against the prisoner.

Verdict—Guilty of manslaughter.

*221] *Justice*, and *Abbott*, for the prosecution.
Ludlow, Serjt., and *Carrington*, for the defence.

[Attorneys—*Looker*, and *H. Taunton*.]

WORCESTER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

REX v. CLEWES. *March 11.*

A. was indicted for the murder of H. It was opened that A., having malice against P., hired H. to murder him, and that H. did so, but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P.; and it was held that the prosecutor might also give evidence to show that H. was, in fact, the person by whom P. had been murdered.

A person charged with murder made a confession before the Coroner. It appeared that, before he made this confession, B., who was both a clergyman and a magistrate, had had an interview with him:—Held, that the prosecutors were not bound to call B. before they put in the confession, but that it would be fair for them to do so; and that if the prosecutors did not call B., the prisoner might call him before the confession was read, to prove that some inducement was held out.

A., a prisoner charged with murder, was visited by B., who was both a magistrate and a clergyman; B. told him, that if he was not the person who struck the fatal blow, and he would tell all he knew, he (B.) would use his endeavours and influence to prevent anything from happening to him; and that if he (A.) did not make a disclosure, some one else would probably do so. After this B. wrote to the Secretary of State, who returned an answer that mercy could not be extended to A.; which answer was communicated by B. to A. After this, A. sent for the Coroner, and wished to make a statement. The Coroner told him that if he did so, it would be used as evidence against him. The prisoner made a confession.—Held, that this confession was admissible.

If a prisoner, in a confession made before a Coroner, which is taken down in writing, mention the names of two other persons who are also charged with the same offence, the confession, when read in evidence, must be read with these names in it, just as it is, and the officer of the Court must not say "another person," and "a third person," instead of reading the names.

If a prisoner, charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the Judge will not direct an acquittal, as the Jury may believe one part of the confession and disbelieve another; however, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that.

MURDER. The prisoner was indicted for the murder of Richard Hemmings, on the 25th of June, 1806, by striking him on the head with a bloodstick.

*222] The case opened on the part of the prosecution was, *that in the year 1806, great enmity subsisted between Mr. Parker, who was the rector of the parish of Oddingley, and his parishioners, and that the prisoner had used expressions of enmity towards Mr. Parker, and had said he would give 50*l.* to have him shot. It was also opened, that Mr. Parker was shot by the deceased Richard Hemmings, who was detected in the fact; and it was imputed that the persons who had employed him, fearing that they should be discovered as having hired him to murder Mr. Parker, had themselves been guilty of the murder of Hemmings, whose bones, on the 28th of December, 1829, were found buried in a barn, which had, in the year 1806, been occupied by the prisoner.

The finding of the bones was proved, and the wife of Hemmings identified a carpenter's rule, and the remains of a pair of shoes, which were found at the place where the bones were discovered; and she also identified the skull of the deceased, by something remarkable about the teeth. Evidence was also given of various declarations of the prisoner, showing that he entertained malice against Mr. Parker; and the counsel for the prosecution then proposed to show that Hemmings was the person by whom Mr. Parker was murdered.

Ludlow, Serjt. I submit that, as Mr. Parker's death is not the subject of the present inquiry, we cannot hear anything respecting the person by whom he is supposed to have been murdered.

LITTLEDALE, J. I think that I must receive the evidence on the part of the prosecution; it is put thus—That the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings to prevent a discovery of their own guilt. Now, to ascertain whether or not that was so, in point of fact, it is necessary that I *should receive evidence respecting the murder of Mr. Parker.

[*223]

The evidence was received.

The counsel for the prosecution then proposed to give evidence of a confession made by the prisoner before the Coroner; and it was proved by the Coroner's clerk, that the prisoner sent for the Coroner to the prison, desiring to make some statement; and that, before he stated anything, the Coroner said to him, that any confession or admission that he made would be produced against him at the next Assize, on a trial for the murder of Richard Hemmings, and that no hope or promise of pardon could be held out to him, either by his Majesty's government or anybody else. It, however, appeared that, previous to this time, the Rev. R. Clifton, a magistrate, had had an interview with the prisoner; and it was suggested by *Ludlow*, Serjt., that he might have told the prisoner that it was better for him to confess; and that, therefore, the counsel for the prosecution were bound to call Mr. Clifton.

LITTLEDALE, J. As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses.

Curwood, for the prosecution, declined calling Mr. Clifton; and he was called and examined by *Ludlow*, Serjt.

Mr. Clifton stated, that he had told the prisoner, that if he was not the man that struck the fatal blow, he (Mr. C.) would use all his endeavours and influence to prevent any ill consequences from falling on him, if he would disclose what he knew of the Oddingley murders. Mr. Clifton also stated, that he told the prisoner that there were so many *living persons concerned in the transaction, that it would be made known by some or other of them; [*224 and that he said this to have the effect of working on the prisoner's mind, to induce him to make a confession. Mr. Clifton further stated, that he wrote a letter to the Secretary of State for the Home Department, to which he received an answer stating, that mercy could not be extended to the prisoner, for reasons that were therein mentioned; which answer he communicated to the prisoner.

All this had occurred before the time of the prisoner's sending for the Coroner to the prison.

Ludlow, Serjt., objected that this declaration of the prisoner was not admissible in evidence. There were several inducements held out to the prisoner: one was, that Mr. Clifton would interest himself with the Government; that inducement had, no doubt, been removed; however, there were two other inducements, which were, *first*, the hope that would arise from the personal endeavours of Mr. Clifton in his favour; and *secondly*, the fear that if the prisoner did not confess, some one else would tell before him.

LITTLEDALE, J. I think that this declaration is clearly admissible. I think that the conversation with Mr. Clifton, after he had received the Secretary of State's letter, and the caution given by the Coroner, must be taken to have

completely put an end to all the hopes that had been held out. The nearest case to this is the case of Gilham, which was considered by the twelve Judges: Carr. Supp. 61.

Mr. Bellamy, the clerk of assize, was proceeding to read the confession, omitting the names of two persons, named Banks and Barnett, who were in custody charged with this same murder (jointly with the prisoner), on the Coroner's inquisition.

*225] *LITLEDALE, J. You must read all the names, and read every word just as it is. I have considered this point very much, and I am of opinion that the names ought not to be left out; but I shall tell the Jury that this statement is no evidence against any one besides the person making it.(a)

The confession was read accordingly. In this confession the prisoner stated, that he was present at the murder of Hemmings, which took place in his barn; but that the murder was committed by a person named Taylor (since dead), and that he (the prisoner) took no part in it, and was wholly unconscious of any injury being intended towards the deceased.

Ludlow, Serjt., objected that there was no evidence to go to the Jury, for that the only thing to connect the prisoner with the murder of Hemmings, was his own declaration; and that, although that declaration was admissible as evidence that he was present at the murder, yet it was *equally evidence that he was there taking no guilty part in the transaction. And he cited the case of *Rex v. Jones*.(b)

LITLEDALE, J. I think that I must leave it to the Jury. The confession must be taken altogether, and it is evidence for the prisoner as well as against him; but still the Jury may, if they think proper, believe one part of it and disbelieve another.

The prisoner was called on for his defence.

LITLEDALE, J., (in summing up.) A good deal of evidence has been given respecting the murder of Mr. Parker, but with his death you have nothing to do, except so far as it goes to show that the prisoner is guilty of the murder of Richard Hemmings. It may be said, that the murder of Mr. Parker has nothing to do with the murder of Hemmings; but still I think that you ought to take the evidence into your consideration, because there might have been an object in destroying Hemmings, as it would prevent him from giving evidence against any person who might have employed him to murder Mr. Parker. With respect to the prisoner's confession, I think you must take it altogether; and by that it appears, that though the prisoner was present, he did not act in the murder of Richard Hemmings; and if it is to be said that the prisoner did more than is stated in his confession, there should be some evidence of that, which is not to be found in this case.

Verdict—Not Guilty.

Curwood, Whateley, and Godson, for the prosecution.

Ludlow, Serjt., and F. V. Lee, for the prisoner.

[Attorneys—Parker & Smith, and S. Godson.]

(a) See the case of *Rex v. Hearne*, ante, p. 215. In Phill. Law of Ev. ch. 5, s. 5, it is said, that "the confession of a prisoner is not to be taken in parts, but the whole together; that what is given in evidence may be neither more nor less than the prisoner intended. If the confession is not in writing, the whole of what the prisoner said must be fully stated, although it may happen that some part of it concerns other prisoners who are tried on the same indictment. In such a case, it is not possible to make any selection, for until the evidence has been heard, it cannot be known what it is or to whom it relates, and all that can be done is, to direct the Jury not to take into their consideration such parts as affect the other prisoners. But a distinction might perhaps be made in this respect, in case the confession has been reduced into writing, if that part which relates to the other prisoners is capable of being separated and detached from the rest, and can be omitted without affecting, in any degree, the prisoner's narrative against himself." The practice has been, in reading confessions, to omit the names of other accused parties, and where they are used to say "another person," "a third person," &c., where more than one other prisoner was named; and some Judges have even directed witnesses, who came to prove verbal declarations, to omit the names of those persons in like manner.

(b) 2 C. & P. 129. See also the case of *Rex v. Higgins*, 3 C. & P. 603; and the cases cited in Carr. Supp. p. 59.

*STAFFORD ASSIZES.

[*227]

BEFORE MR. BARON BOLLAND.

REX v. ANDREW PICKFORD. *March 15.*

An anonymous letter stated, that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent; and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt:—Held, that this was not a threatening letter within the stat. 7 & 8 Geo. 4, c. 29, s. 8, although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns.

INDICTMENT on the 8th section of the stat. 7 & 8 Geo. 4, c. 29, for sending a letter to Samuel Young, demanding money, with menaces.

The letter was addressed to Mr. Samuel Young, and was as follows:—

“Sir,—As you are a gentleman, and highly respected by all who know you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair. I mean to say, your building property, in the manner they have planned this dreadful undertaking, would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which would be a most dreadful sight. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. Tatler’s garden gate, I will leave a letter in the place, to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders; but you must keep all this quite secret, and not make a talk of it, as it would come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me, when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will please *excuse me in [*228 not describing my name, but I will make myself known the day after you have taken them, and be a witness against them. I shall come to lay down my letter on the 1st of December, if I find the money. Sir, I am your unknown friend.”

On the back of the letter was written—“Sir, I shall be much obliged if you would lay it down by 9 o’clock on the 1st of December, as it wont require much, nor admit of much time, as I am doing all for your advantage.”

It appeared, that after receiving this letter, Mr. Young put thirty farthings into a purse, and laid them down at the place appointed on the 1st of December, at a little before nine o’clock; and it also was proved, that the prisoner came and took them up; and that, on his being taken, he said that the letter was of his handwriting, and that he had written it with an intention of getting the thirty sovereigns, to leave the country.

BOLLAND, B., doubted whether the letter contained either a demand or a menace.

Greaves, for the prosecution, cited Robinson’s case, 2 Leach, 749, and argued that this was a sufficient demand of the money, as the request was accompanied by a condition, namely, to discover persons going to do a certain act; and, with respect to the menaces, to say that there were none here, would be equivalent to holding, that, whenever the menaces came from one person, and the letter from another, neither could be indicted under the stat. 7 & 8 Geo. 4, c. 29; and he submitted that, at all events, it would be a question for the Jury, whether the letter contained menaces.

BOLLAND, B., after conferring with Mr. Justice Littledale, said, that he would reserve the case for the opinion of the twelve Judges.

The Jury found the prisoner guilty.

*229] **Greaves*, for the prosecution.

[Attorney—*Cruso*.]

In the ensuing Term the twelve Judges held, that the conviction was wrong; and the prisoner was therefore discharged.

SHREWSBURY ASSIZES.

BEFORE MR. BARON BOLLAND.

REX v. WATTON.

If a prosecutor, having removed an indictment by *certiorari*, give notice of trial for the Assizes, and bring down the record, and withdraw it after it has been entered for trial, the Judge at the Assizes cannot order the prosecutor to pay the defendant the costs of the day; but a motion must be made in the Court of King's Bench.

INDICTMENT for a libel. The indictment had been preferred and found at the Assizes, and had been removed into the Court of King's Bench by *certiorari*, at the instance of the prosecutor. Notice of trial was given by the prosecutor, and the record was brought down by him, and entered for trial at these Assizes; however, just before the case was called on, the prosecutor withdrew his record.

Curwood, for the defendant, applied to the Learned Baron to order that the prosecutor should pay the defendant the costs of the day.

BOLLAND, B. I think that I have no power, sitting at *Nisi Prius*, to make such an order. I think your application should be made in the Court of King's Bench.

Application refused.

Taunton, *Campbell*, and *R. V. Richards*, for the prosecution.

Curwood, for the defendant.

[Attorneys—*Brandstrom*, and *Williams*.]

*230] *In the ensuing Term, *Curwood* applied in the Court of King's Bench, for a rule to compel the prosecutor to pay these costs; which was granted on the authority of the case of *Rex v. Bartrum*.(a)

(a) 8 East, 269. In that case the indictment had been found at the Sessions, and removed into the Court of King's Bench by *certiorari*. The prosecutor gave notice of trial to the defendant, for the sittings, and withdrew his record without countermanding his notice of trial in time; and the Court held; that the prosecutor was liable to pay the defendant his costs; and granted a rule for the payment of them accordingly.

HEREFORD ASSIZES.

BEFORE MR. JUSTICE LITLEDALE.

REES on the demise of MEARS v. PERROT. *March 27.*

A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession:—Held, that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant, and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix.

EJECTMENT to recover the possession of a farm, situate at Llanstephan, in the county of Carmarthen.

The farm in question had been let by the lessor of the plaintiff to a person named Davies, who had held it as tenant from year to year; and it was proved, that, Davies being dead, a notice to quit was served on his widow, who remained in possession after his death.

E. V. Williams, for the defendant. I submit that the plaintiff must be nonsuited. In the case of *Doe dem. Shore v. Porter*,^(a) it was held, that if a tenant from year to year die, his interest passes to his personal representative. Now, here it is not shown that the person on whom this notice was served, was the personal representative of *Davies; which I contend it must be, [*231 before the lessor of the plaintiff can be entitled to recover.

LITLEDALE, J. If you show, on the part of the defendant, that Davies made any will, or that any administration has been granted, you will raise that point. A personal representative can only be constituted either by a will or by letters of administration; and without its being proved that there is either the one or the other, you only show a possibility of there being a personal representative. I think the lessor of the plaintiff is entitled to recover.

Verdict for the plaintiff.

Russell, Serjt., and John Evans, for the plaintiff.

E. V. Williams, for the defendant.

[Attorneys—*Jones*, and *H. Lewis*.]

(a) 3 T. R. 13. It was there held that in the case of "a tenancy from year to year, so long as both parties please," if the tenant die intestate, his administrator has the same interest in the land which the intestate had.

BEFORE MR. BARON BOLLAND.

REX v. THOMAS LAWRENCE and THOMAS WEAVER. *March 30.*

The lifting up of a trap-door covering a cellar, which was merely kept in its place by its own weight, and which had no fastenings, because, it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary; but unlocking and opening a hall-door and running away, is a sufficient breaking out of the house.

BURGLARY. There were two counts in the indictment: the *first* charging the prisoners with breaking into the dwelling-house of Henry Gatehouse, with intent to steal his goods; the *second* count charged a breaking out of the house.

There was no evidence to show how the prisoners got into the house, but the evidence of the breaking out was as follows: Mr. Gatehouse, the prosecutor, said, "At about half past ten o'clock, on the night of the 6th of December,

*232] *I secured my house and went to bed. There is a trap-door over the cellar in the court-yard, which was down. This trap-door drops down into its place, but has no fastening of any kind; it is merely kept down by its own weight. This trap-door is a new one; and on the 6th of December, the fastenings had not been put upon it. The old trap-door, for which this new one was substituted, had been secured by fastenings. I did not lose any of my property." A watchman said, "I was on duty on the night of the 6th of December; I saw the prisoner Lawrence push up the trap-door and come out of Mr. Gatehouse's cellar. I also heard the footsteps of a man in Mr. Gatehouse's hall, I heard a second man unlock the hall-door, and open it, and then run out of the house. That man was the other prisoner."

Powell, for the prisoners, objected that the lifting up of the flap was not sufficient to constitute a breaking.

Davies, *contra*, cited the case of *Rex v. Brown*, 2 Ea. P. C. 487.

BOLLAND, B. I am of opinion that the lifting up of this flap by the prisoner Lawrence is not a sufficient breaking. I think, therefore, that he must be acquitted. As to the other prisoner, I am decidedly of opinion, that the unlocking and opening of the hall-door and running away are sufficient to constitute a breaking out of the house. The case is therefore made out as to him, if the Jury are satisfied that he is the person who broke out of the house.

The Jury acquitted both the prisoners.

Davies, for the prosecution.

Powell, for the defence.

[Attorneys—Preece, and Russell.]

*233] *REX v. ROBERT LLOYD, JAMES WILLIAMS, and
JOHN ROBERTS. March 31.

On an indictment for robbery, the declaration *in articulo mortis* of the party robbed is not admissible in evidence.

THE prisoners were indicted for robbing Francis Wellington with force and violence.

Before the time of the trial, Wellington had died; and Russell, Serjt, submitted to the Learned Baron, whether he could be allowed to give in evidence a declaration made by Wellington *in articulo mortis*.

Curwood, for the prisoners, cited 1 Phill. Ev. 237, (a) and the cases of *Rex v. Mead*, 4 D. & R. 120, 2 B. & C. 606, S. C., and *Doe dem. Sutton v. Ridgway*, 4 B. & A. 54.

BOLLAND, B. I am of opinion, that I ought not to receive this evidence. I think that declarations *in articulo mortis* are not admissible in evidence to make out a charge of robbery; nor, indeed, any other charge, except those in which the death of the deceased person, by whom the declaration was made, is the subject of the inquiry. I must reject the evidence.

This evidence being rejected, the case was made out by means of other proof.

The Jury found all the three prisoners Guilty.

(a) It is there said, that, in trials for robbery, the dying declarations of the party robbed have been held to be inadmissible by Mr. Justice Bayley, on the Northern Spring Circuit, 1822, and by Best, C. J., on the Midland Spring Circuit, 1822. And in the case of *Rex v. Hutchinson*, Durham Spring Assizes, 1822, 2 B. & C. 606, n., where the prisoner was indicted for administering savin to a pregnant woman, it appeared that the woman was dead; and for the prosecution, evidence of her dying declaration upon the subject was tendered: but Bayley, J., rejected the evidence, observing, that although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone, where the death of the party was the subject of inquiry.

**Russell*, Serjt., *R. V. Richards*, and *Powell*, for the prosecution.
Curwood, and *Carrington*, for the prisoners.

[*234]

[Attorneys—*Pateshall & Bellamy*, and *E. Pritchard*.]

MONMOUTH ASSIZES.

BEFORE MR. BARON BOLLAND.

WILLIAMS, Administrator of WILLIAMS, v. THOMAS. April 6.

In replevin there was a cognisance for rent in arrear. To this there were two pleas, the one stating that a certain agreement had been entered into between the landlord and tenant, and that the tenant was subsequently induced by the landlord to enter into another agreement; which second agreement was the demise in the cognisance mentioned; and that this latter agreement had been abandoned by mutual consent before any rent became due. The other plea was similar, except, that it averred that the tenant was induced to enter into the second agreement by fraud. Replication to the one, denying the abandonment; and to the other, denying the fraud:—Held, that, on these pleadings, the plaintiff had the right to begin.

REPLEVIN. There were six cognisances for rent in arrear. The *first* stated, that the rent was 200*l.* a year, and three tons of coal every month. The *second* cognisance, stated that the rent was 200*l.* a year, and 10*d.* a ton upon all coal raised from the premises, but that the rent of 200*l.* should be deducted from the 10*d.* a ton, and three tons of coal monthly; and the three other cognisances varied slightly from the second. Pleas to the first cognisance—*First*, that the 200*l.* was not in arrear, and that the coal was never demanded. *Second* plea to the first cognisance, that neither the 200*l.* nor the coals were in arrear. To each of the other cognisances, the defendant pleaded separate pleas, *first*, *non tenuit*; *secondly*, *riens* in arrear; and *thirdly*, that the 10*d.* a ton never exceeded 200*l.* a year. The *eighteenth* plea was to the last five cognisances, and it commenced with an averment, that all the demises in those cognisances mentioned, were one and the same; and this plea went on to state, that a certain agreement had been entered into between the intestate and J. H. Moggridge, the person to whom the defendant was bailiff, and that the *intestate was induced and [*235 persuaded by J. H. Moggridge to enter into another agreement (which was set out); and it then averred, that each of the demises in the last five cognisances mentioned, was the demise contained in the second agreement; and, that after the making thereof, and before any rent became due, the same was abandoned by mutual consent. The nineteenth plea was similar to the eighteenth, except that it averred that the intestate was induced to enter into the second agreement by fraud and misrepresentation, instead of stating that it was abandoned. Replication to the eighteenth plea, denying the abandonment of the agreement; and to the nineteenth plea, denying the fraud and misrepresentation.

Taunton, for the defendant, contended that he had a right to begin, because, though the affirmative of the issue taken on the eighteenth and nineteenth pleas was, in point of form, upon the plaintiff; yet, as these pleas amounted, in substance, to no more than a plea of *non tenuit*, it lay upon the defendant to prove the tenancy.

Campbell, for the plaintiff. The Judge will only look at the pleadings, and see upon whom the affirmative lies; and that, in the present case, is clearly on the plaintiff.

BOLLAND, B. These pleas do amount very nearly to *non tenuit*; yet, as, in point of form, the affirmative is on the plaintiff, I think that he ought to begin. The plaintiff began. Verdict for the plaintiff.

Campbell, Ludlow, Serjt., and Holroyd, for the plaintiff.
Taunton, and Blewitt, for the defendant.

[Attorneys—*Bigg, and Prothero & Phillips.*]

See the case of *Curtis v. Wheeler*, *ante*, p. 196.

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*BEFORE MR. JUSTICE LITLEDALE.

REX v. ELIZABETH OWEN. April 6.

If a child more than seven and under fourteen years of age, is indicted for felony, it will be left to the Jury to say whether the offence was committed by the prisoner, and if so, whether, at the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence.

INDICTMENT for stealing coals. The prisoner was ten years of age, and it was proved that, on the 28th of January, she was standing by a large heap of coals belonging to Messrs. Harford & Brothers, and that she put a basket upon her head. This basket was found to contain a few knobs of coal, which, in answer to a question put to her by the witness for the prosecution, she said she had taken from this heap.

LITLEDALE, J., was about to call upon the prisoner for her defence, when *Carrington, amicus curiæ*, suggested that she was entitled to an acquittal. He submitted that a child under seven years of age could not legally be convicted of felony; and that, in cases where the accused was between the ages of seven and fourteen, it was incumbent on the prosecutor to prove, not only that the offence was committed, but also that the offender had, at the time, a guilty knowledge that he or she was doing wrong.

LITLEDALE, J. I cannot hold that a child of ten years of age, is incapable of committing a felony. Many have convicted under that age.

Carrington. No doubt that is so. A boy, named York, who was only ten years old, was convicted of a murder; but in that case there was the strongest evidence of guilty knowledge: *Fost.* 70.

LITLEDALE, J. I think I must leave it to the Jury.

The prisoner was then called on for her defence.

*237] *LITLEDALE, J. (in summing up), said—In this case there are two questions; *first*, did the prisoner take these coals; and *secondly*, if she did, had she at the time a guilty knowledge that she was doing wrong. The prisoner, as we have heard, is only ten years of age; and, unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted, unless there be evidence to satisfy the Jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong. (a)

Verdict—Not guilty; and the foreman of the Jury added, "We do not think that the prisoner had any guilty knowledge."

Lumley, for the prosecution.

[Attorneys—*Prothero & Phillips.*]

(a) The law on this subject is very fully gone into in 1 *Curw. Hawk.* p. 1, n. 1; and is also treated of by Lord Hale, (1 *H. P. C.* ch. 3), and by Mr. Justice Blackstone (4 *Com.* ch. 2). It is believed that the youngest person who was ever executed in this country, was a boy between eight and nine years old, named Dean, who was found guilty of burning two barns at Windsor, "and it appearing that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly." This case was tried before Whitlock, J., at the *Kingdon Assizes*, 1629, and is reported in *Emlyn's Edit.* *H. P. C.* p. 25, n. (w).

REX v. MATTHEW THOMAS. *April 7.*

It is not a "beginning to demolish" a house within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 8, unless the Jury be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into full effect, they would, in point of fact, have demolished it.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for "beginning to demolish" the dwelling-house of John Williams.

*It appeared that the prisoner and others, on the 15th of March, 1830, at about midnight, came to the house of the prosecutor; and that, having in a riotous manner burst open the door, they broke some of the furniture, all the windows, and one of the window frames, and forced out a small iron bar; and that, after doing this mischief, they went away. It did not appear, that there was anything to hinder the rioters from doing more damage if they had chosen so to do.

Curwood, for the prisoner, objected that this was not a beginning to demolish the house.

LITLEDALE, J. I am of opinion, that this will not be a "beginning to demolish," within the act of parliament, (a) unless the Jury shall be satisfied that the ultimate object of the rioters was to demolish the house; and that, if they had carried their intentions into full effect, they would, in point of fact, have demolished it. Now here that is not so, for they come and do a great deal of mischief, and then go away, having manifestly completed their purpose, and done all the injury they meant to do.

Verdict—Not guilty.

Greaves, for the prosecution.

Curwood, for the defence.

[Attorneys—*T. J. Phillips*, and *Owen*.]

(a) By the stat. 7 & 8 Geo. 4, c. 30, s. 8, it is enacted, that "if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

*HOME CIRCUIT. 1830.

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HORSHAM ASSIZES.

BEFORE MR. JUSTICE RAYLEY.

FORDE v. SKINNER and Others. *March 26.*

If parish officers cut off the hair of a pauper in the poor-house, by force, and against the will of such pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages.

FALSE imprisonment with a count for a common assault. Plea—General issue.

The defendants were the parish officers of the parish of Ninfield, in Sussex; and the plaintiff was a young woman, who was a pauper in the poor-house there. The false imprisonment was not proved; and the assault complained of was, that, on the 10th of December, 1829, the defendants sent for the plaintiff into a room in the poor-house, and by force, and against her consent, cut off her hair; and it appeared, that in the struggle, occasioned by her resisting, one of her arms was bruised. It was shown that the plaintiff wore long hair, and kept it in a clean and neat state; and there was also evidence given that when the plaintiff had, shortly before, gone with two of the defendants before the magistrates at Battle, one of the defendants said, alluding to the plaintiff and her sister, who was also in the poor-house, that he would soon do something "to take their pride down." It also appeared, that the sister's hair was cut off in a similar way.

BAYLEY, J. (in summing up.) However desirable such a regulation as that of cutting off the hair of persons in a poor-house may be with regard to health *240] and *cleanliness, yet it is altogether unauthorized by law, and is a wrongful act, if done without the consent of the party. If, in this case, it was done violently and with force, and with the malicious intent imputed, namely, of "taking down their pride," and not with a view to cleanliness, that will be an aggravation, and ought to increase the damages. You will therefore decide on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages.

Verdict for the plaintiff—Damages 69l.

Platt, and *Thesiger*, for the plaintiff.

Gurney, for the defendants.

*241] *NORFOLK SPRING CIRCUIT. 1830.

BEFORE MR. BARON VAUGHAN.

BEDFORDSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. HENRY LEVY. *March 9.*

A. delivered his watch to B. to be repaired. Instead of repairing it, he sold it; and A., being informed of this, told B. that he would either have his watch back again or the money:—Held, no felony.

INDICTMENT for stealing a watch, the property of John Bandy.

It appeared that the prosecutor and the prisoner had met together at a public-house; when the prosecutor said to the prisoner, "My watch wants repairing, I wish you would take it and repair it." The prisoner took the watch, promising to return it in two or three days. A week afterwards, the prosecutor asked the prisoner for the watch, when the latter said, it was not ready; and when the prosecutor saw him again, he said he had sold it. To this the prosecutor replied, "I will have my watch or the money." The prisoner said, "I will give you either the watch or money to-morrow."

Smith, for the prisoner, submitted that this was no felony:—the prosecutor had delivered the watch to the prisoner to be repaired, and, on learning that it was sold, had acquiesced in the sale.

VAUGHAN, B. I think it would be too much to construe this to be a felony. It would have been different if the prisoner had obtained the watch by trick or fraud. Here it was voluntarily delivered to him.

Verdict—Not Guilty.

**Smith*, for the prisoner.

[Attorney—*Hankin*.]

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HUNTINGDONSHIRE ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. HOLLINGSHEAD. *March 13.*

A prisoner being under examination before a magistrate, on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which, the witness called to prove it said, he *believed* had been taken down in writing:—Held, that under these circumstances parol evidence of the statement was not admissible on the trial of such prisoner.

INDICTMENT for breaking and entering a dwelling-house, and stealing therein bank notes and money.

Mr. Cope, the City Marshal, was called to depose to a statement made by Mr. Gates, the solicitor for the prosecution, to the Lord Mayor of London, at the Mansion-house, on the examination of the prisoner.

Storks, Serjt., asked, if this statement was taken down in writing?

Andrews, for the prosecution. It need not be. Mr. Gates was not examined on oath, and what he said in the presence of the prisoner is admissible.

Mr. Cope, in answer to questions put by *Storks*, Serjt., stated, that Mr. Hobler, the clerk at the justice-room at the Mansion-house, was in the habit of taking down in writing whatever was stated on examinations there; and that he believed that what Mr. Gates had said to the Lord Mayor on this occasion, was so taken down.

VAUGHAN, B. I shall presume that what passed, being, in fact, part of the examination, was taken down,^(a) and if so, it should have been here. I think I ought not to receive Mr. Cope's evidence.

*The evidence was rejected, and the case made out by other proof.

Verdict—Guilty.

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Andrews, and *Gunning*, for the prosecution.

Storks, Serjt., and *Smith*, for the prisoner.

[Attorneys—*Gates*, and *Butler*.]

(a) *Vide* the case of *Phillips v. Wimburn*, *post*, in which *Tindal*, C. J., held, that it was to be presumed that what a party said upon oath before a magistrate, was taken down in writing, although the party called to give parol proof of it said, that he did not perceive that it was.

It is important to consider whether anything said during the examination of a prisoner before a magistrate, can be received in evidence, merely on the ground of its being said in the presence of the prisoner. The reason why anything said in the presence of the prisoner is receivable as evidence against him is, that, being said in his hearing, he might have contradicted it if he had chosen. Now, this seems hardly to apply to what takes place at the time of the examination before the magistrate, because, as the prisoner could not keep up a running commentary of contradictions, with respect to everything said against him, the reason of admitting such evidence appears to fail. In the case of *Rex v. Appleby and Others*, 3 Stark. N. P. C. 33, two prisoners were examined on a charge of horse-stealing, and one of them, in the presence of the other, stated, that they jointly committed the felony; but this was held to be no evidence against the other, although he did not deny it. Indeed, if what was said before the magistrate by persons not upon oath, were admissible in evidence against the prisoner, as being something said in his presence, there would be this difficulty: viz. that what a witness said upon his oath before the magistrate, which was taken down in writing, and signed by the witness, would not be admissible in evidence, unless such witness were dead; but if a person, not upon his oath, chose to say anything, what he said would be receivable, as being

something said in the presence of the prisoner: which, as it seems, could hardly be the law. In the case of *Melen v. Andrews*, 1 M. & M. 336, it was held, that the deposition of a witness, taken in the presence of the party there charged, is not admissible in evidence in another proceeding against that party, on the ground that he was present, and might have cross-examined; and Mr. Justice J. Parke said, "I think that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party, against whom it is sought to be read, was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under investigation, had not the right of interfering, and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony, but still, in an investigation of this nature, there is a regularity of proceeding adopted, which prevents the party from interfering when and how he pleases, as he would in a common conversation."

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*CAMBRIDGE ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. HATFIELD. *March 18.*

In an information for a libel, imputing improper conduct to A. as Town-clerk of H., it was alleged that he was Town-clerk, and that it was his duty to issue his precept for summoning the Grand Jury. The precept was signed both by the Mayor and Town-clerk:—Held, that this satisfied the allegation, that he issued his precept, and that the fact that he was an Alderman of the Borough at the time when he was elected Town-clerk, made no difference.

INFORMATION for a libel on Mr. Maule, Town-clerk of Huntingdon, imputing to him improper conduct in the summoning of the Grand Jury at the Borough Sessions.

The information stated, that Mr. Maule was the Town-clerk, and that it was his duty to issue his precept for summoning twenty-four good and lawful men as Grand Jurors.

It appeared by the evidence, that, at the time Mr. Maule was elected Town-clerk, he was one of the Aldermen of the Borough; and on the precept for summoning the Grand Jury being put in, it appeared to have been signed by the Mayor as well as by the Town-clerk.

Pryme, for the defendant. This indictment states the prosecutor to be the Town-clerk; now, it appears by the evidence, that he was an Alderman when he was elected Town-clerk, and being so, he is not, and cannot be a legally elected Town-clerk. (a)

VAUGHAN, B. I am of opinion that there is nothing in this objection.

*245] *Kelly*, for the defendant. I submit that this precept is not the precept of the Town-clerk, but of the King, or perhaps of the Mayor, being only signed by the Town-clerk after the signature of the Mayor.

VAUGHAN, B. I think the Town-clerk's name being to the precept, it may be taken to be his. His was the hand that issued it.

Verdict—Not Guilty.

Storks, Serjt., and *Andrews*, for the prosecution.

Pryme, and *Kelly*, for the defence.

[Attorneys—*Maule*, and *Sweeting*.]

(a) In the case of *Rex v. Pateman*, 2 T. R. 777, it was held, that where the offices of town-clerk and of alderman are incompatible, which they are in those corporations where the aldermen are judicial officers, and the town-clerk acts ministerially under them, the appointment of an alderman to be town-clerk is equivalent to an motion from the office of alderman. And in the case of *Milward v. Thatcher*, 2 T. R. 81, it was decided, that if two offices in a corporation be incompatible, a party, by acceptance of the second, though an inferior office, will vacate the first.

REX v. READER and TURNER. *March 19.*

An indictment on the stat. 7 & 8 Geo. 4, c. 30, ss. 2, & 17, for setting fire to a barn and a stack of straw, charged the offences to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously:" Held bad. The prisoners had set fire to a stack of stubble (which, in Cambridgeshire, is called haulm); they were indicted on a first indictment, for setting fire to a "stack of straw:"—Held, that this was not straw. And, on their being again indicted, for setting fire to a "stack of straw called haulm," the Judge intimated, that to convict upon such a count, would not be safe; and the verdict, in consequence, was taken upon other counts, charging the setting fire to a barn and a wheat-stack.

THE prisoners were tried before Mr. Justice J. Parke, at the Cambridge Summer Assizes, in 1829, upon an indictment, which, in the *first* count, charged them with having "feloniously, voluntarily, and maliciously," set fire to and burnt a certain barn. The *second* count charged them with having "feloniously, voluntarily, and maliciously," set fire to and burnt a certain stack of straw, against the form of the statute. And there were *two* other counts exactly similar, for burning the barn, except that they laid the property in other persons; and concluded against the form of the statute.

It appeared that the prisoners had set fire to a barn, and also to a stack of what in Cambridgeshire is called haulm, and in some other counties, stubble.

Smith, for the prisoners, objected, *first*, that this haulm, *set fire to, [246] was not straw within the meaning of the act of Parliament, 7 & 8 Geo. 4, c. 30, s. 17. *Secondly*, that the *first* count was bad, as it did not state that the barn was full of corn, which was essential, as that count was framed at common law. *Thirdly*, that the three latter counts, which were framed under the statute 7 & 8 Geo. 4, c. 30, ss. 2, and 17, were bad, as they stated the offence to have been committed "feloniously, voluntarily, and maliciously," instead of charging it to have been done "feloniously, unlawfully, and maliciously," according to the words of the statute.

Mr. Justice J. PARKE reserved the points.

VAUGHAN, B., now delivered the opinion of the twelve Judges, who were unanimously of opinion that the indictment was bad upon all the objections taken at the trial.

The prisoners were again indicted under the statute 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to the barn; and also under the same statute, s. 17, for setting fire to a "stack of straw, called haulm." There were other counts for setting fire to a wheat stack, &c.

VAUGHAN, B., intimated that, in his opinion, it was unsafe to convict upon the count for setting fire to the straw called haulm; and the prisoners were convicted upon the other counts.

Hunt, for the prosecution.

Smith, for the prisoners.

*THETFORD ASSIZES.

[247]

BEFORE MR. BARON VAUGHAN.

REX v. HIGGINS. *March 24.*

A collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty. A. denied that he had done so, and gave the collector a promissory note for 5*l.*, the amount of which, after it became due, was paid by A. to the collector, who handed it over to his principal, the farmer of the post-horse duties: Held, that this was extortion in the collector, and that his having paid the money over to his principal made no difference.

INDICTMENT for extortion. The defendant was a collector of the post-horse duty, in the county of Norfolk, and he went to the prosecutor, a person named Holmes, and charged him with having let out post-horses without paying the duty, and demanded of him a sum of money for having so done. The prosecutor denied that he had let any horses for hire; but, being threatened by the defendant with an Exchequer process, he gave his promissory note for 5*l.*, which was afterwards paid to the defendant, who handed over the proceeds to his principal, the farmer of the post-horse duties.

VAUGHAN, B. I cannot see by what authority the defendant, as collector, without any magistrate or other person intervening, could take this note for 5*l.*, either as a mitigated penalty, or in any other way.

Storks, Serjt. He took it not as a penalty, but for duty.

VAUGHAN, B. The duty is to be taken upon a return. Here there was no return; the defendant goes on his own authority and takes the money.

Storks, Serjt. I submit that this is not extortion in point of law, because the defendant did not take this money *causa lucri*, but paid it over to his principal.

*248] VAUGHAN, B., held that the taking of the note by the *defendant, and the receipt of the amount of it when due, were sufficient to constitute the offence, notwithstanding the fact of his having afterwards paid over the proceeds to his principal.

Verdict—Guilty.

Flanagan, for the prosecution.

Storks, Serjt., for the defence.

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*NORTHERN CIRCUIT.

APPLEBY SPRING ASSIZES. 1829.

BEFORE MR. BARON HULLOOK.

REX v. JENNINGS.

Since the stat. 9 Geo. 4, c. 31, the offence of rape is made out by proof of penetration only; and in such case a prisoner must be found guilty, although there was no emission, and although he did not withdraw himself merely because his lust was satisfied.

INDICTMENT for a rape. There was evidence of penetration, but no evidence of emission.

HULLOOK, B. (in summing up.) If you believe that the prisoner's parts were within the person of the prosecutrix, although there might be no emission, and although they were not withdrawn merely because his lust was satisfied, still the prisoner is equally guilty as if there had been emission, and he had been satisfied; for as the law now stands, penetration is all that is necessary to be proved to make out the offence.

Verdict—Guilty.

By the stat. 9 Geo. 4, c. 31, s. 18, after reciting that 'upon trials of buggery and rape, and of carnally abusing girls under the respective ages thereinbefore mentioned,' (viz. the ages of ten and twelve years,) 'offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes,' it is enacted, "that it shall not be necessary, in any of those cases, to prove the actual emission of seed, in order to constitute a carnal knowledge; but that carnal knowledge shall be deemed complete upon proof of penetration only."

*YORKSHIRE SUMMER ASSIZES. 1829.

[*250]

BEFORE MR. JUSTICE LITLEDALE.

REX v. FLETCHER and Others.

If a letter, written by one of several prisoners, be read in evidence, and in this letter the names of the other prisoners be mentioned, these names must not be omitted in the reading of the letter, but the Judge will tell the Jury to pay no attention to the letter, except so far as it affects the writer.

INDICTMENT for felony. On the part of the prosecution, a letter written by one of the prisoners was put in, and in that letter the names of the other prisoners were mentioned.

It was contended, on the part of the other prisoners, that their names should be omitted in the reading of the letter.

LITLEDALE, J. There has been much doubt upon this point; and on one of the circuits the practice has been to omit the names. I have, however, considered it a good deal, and though my opinion was once different, I am now satisfied that the whole of the letter must be read. But I shall take care to make such observations to the Jury, as will prevent its having any injurious effect against the other prisoners; and I shall tell the Jury that they ought not to pay the slightest attention to this letter, except so far as it goes to affect the person who wrote it.

See the cases of *Rex v. Hearne*, *ante*, p. 215; and *Rex v. Clewes*, *ante*, p. 221.

*REX v. CROWE.

[*251]

If the trial of a prisoner indicted for felony be postponed, on the ground of the absence of the prosecutor, who is a material witness for the prosecution, the prisoner will not be allowed his costs, but the Judge will discharge him on his own recognisance.

INDICTMENT for embezzlement.

Alexander moved to postpone the trial, on the ground of the absence of the prosecutor, who was a material witness, and who was absent from England on private business of his own.

Cottingham, for the prisoner, submitted, that if the trial was postponed, the prisoner ought to be allowed his costs.

LITLEDALE, J. Costs are never paid to prisoners charged with felony. I shall postpone the trial, and discharge the prisoner on his own recognisance, to appear here at the next Assizes.

Alexander, for the prosecution.

Cottingham, for the defence.

See the case of *Rex v. Hunter*, 3 C. & P. 591.

REX v. MITCHELL.

A bankrupt, who was in prison for debt, did not surrender to his commission, nor did he apply to have the time for his surrender enlarged, nor did he apply to be brought up to surrender under sect. 119 of the bankrupt act, 6 Geo. 4. c. 16, nor did he give notice to the commissioners that he was in prison:—Held, that under these circumstances he was not indictable under s. 112 of the stat. 6 Geo. 4. c. 16, for not surrendering to his commission, even though the imprisonment could be shown to have been collusive.

INDICTMENT under the bankrupt act, 6 Geo. 4. c. 16, s. 112, against the prisoner, for not having surrendered to a commission of bankrupt that had been sued out against him.

It appeared that the prisoner was detained in prison as a debtor, at the time when he should have surrendered to his commission; however, it was stated, on the part of the prosecution, that this detainer was collusive; and it was argued, *252] that even if it was not so, it was no ground of *defence to the present indictment, as, by the 119th and 113th sections of the bankrupt act, the prisoner might have either applied to have been brought up to surrender to his commission, or he might have made an application to the Lord Chancellor to have the time for his surrender enlarged, more especially as it was provided by the bankrupt act, that the expenses of bringing up the bankrupt under such circumstances should be paid out of the estate. It was also contended, that the prisoner ought, at all events, to have sent notice to the commissioners that he was in custody as a debtor, that they might have issued their warrant to bring him up to be examined, under the earlier part of the 119th section of the act, at the cost of the estate.

LITLEDAL, J. I think that, as this is a case of felony, the act of parliament must be construed strictly; and I am of opinion that the prisoner was not obliged to give notice to the commissioners, nor was he bound to make an application to be brought up to surrender, although by the act of parliament, he had the *privilege* of so doing, if he had chosen to have availed himself of it; nor do I think he was bound to apply to the Lord Chancellor to enlarge the time for his surrender. The act of parliament, it is true, provides for the payment of the expenses out of the estate, but still it does not provide the prisoner with money for these purposes in the first instance. I do not think that he is compellable to make either of these applications; and as the commissioners had themselves the power to issue their warrant, and by diligent search might have discovered where he was, the bankrupt was not bound to give them notice; at any rate, the omitting to take these steps will not make him guilty of felony under this act of parliament, even if the detainer, under which he was kept in custody, was collusive, as has been stated. Verdict—Not guilty.

*253] *Alexander, and R. C. Hildyard, for the prosecution.
Blackburne, for the prisoner.

By the stat. 6 Geo. 4. c. 16, s. 112, it is enacted, that "if any person, against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt, shall not, before three of the clock upon the forty-second day after notice thereof in writing, to be left at the usual place of abode of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the commission, and of the meetings of the commissioners, surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them, from time to time, upon oath, or, being a quaker, upon solemn affirmation; or if any such bankrupt upon such examination shall not discover all his real or personal estate, and how and to whom, upon what consideration, and when, he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bona fide* before sold or disposed in the way of his trade, or laid out in the ordinary expense of his family); or if any such bankrupt shall not upon such examination deliver up to the commissioners all such part of such estate, and all books, papers, and writings, relating thereunto, as be in his possession, custody, or power (except the necessary wearing apparel of himself, his wife, and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the Court before which he shall be convicted shall adjudge, or shall be liable

to be imprisoned only, or imprisoned and kept to hard labour in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years."

By sect. 113, of the same stat., it is enacted, "that the Lord Chancellor shall have power, as often as he shall think fit, from time to time to enlarge the time for the bankrupt surrendering himself for such time as the Lord Chancellor shall think fit, so as every such order be made **not** days at least before the day on which such bankrupt was to surrender himself."

And by sect. 119, of the same stat., it is enacted, "that whenever any bankrupt is in prison, or in custody, under any process, attachment, execution, commitment, or sentence, the commissioners may, by warrant under their hands, directed to the person in whose custody such bankrupt is confined, cause such bankrupt to be brought before them at any *meeting, either public or private; and if any such bankrupt is desirous to surrender, he shall be [*254 so brought up, and the expense thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the commissioners for bringing up such bankrupt; provided that the assignees may appoint any persons to attend such bankrupt from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects previous to his final examination and discovery thereof; a copy of which abstract and statement the said bankrupt shall deliver to them ten days at least before his last examination."

YORKSHIRE LENT ASSIZES, 1830.

BEFORE MR. JUSTICE J. PARKE.

REX v. WILLIAM HAWORTH. *April 2.*

If a forged deed be in the possession of a prisoner, who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the Assizes, given the prisoner notice to produce it; and a notice given to the prisoner during the Assizes is too late; but if the prisoner has said that he has destroyed the deed, no notice to produce it will be necessary.

A. was charged with forgery, and B. was examined on oath before the magistrate as a witness against A.; after this, B. was himself charged with a different forgery:—Held, that the deposition of B. was evidence against him on his trial for the forgery, notwithstanding that it was taken on oath.

INDICTMENT under the stat. 2 Geo. 2, c. 25, for forging a deed of release.

It was opened, on the part of the prosecution, that, long after the execution and delivery over of the deed in question, the prisoner had obtained the possession of it, and the counsel for the prosecution proposed to give secondary evidence of its contents, by putting in an examined copy made by the person who had engrossed the deed. And they cited Spragge's case. (a)

*Mr. Justice J. PARKE. You must first prove a notice to the prisoner [*255 to produce the deed.

The attorney for the prosecution proved that he had served such a notice on the prisoner; but that he had done so since the commencement of the Assizes.

Mr. Justice J. PARKE. This notice is not sufficient. It has not been served in time. It should have been given a reasonable time before the Assizes.

The counsel for the prosecution then called the clerk to the magistrates by whom the prisoner had been examined and admitted to bail; who stated, that, before the prisoner was either charged with or suspected of having committed any offence, a person named Shearer had been examined on a charge of forgery, and that the prisoner (Haworth) was called as a witness against Shearer on that occasion, and sworn to a deposition.

(a) Mentioned by Lord Ellenborough, in the case of *How v. Hall*, 14 East, 376, n. His Lordship said, "I remember an indictment tried before the late Mr. Justice Buller, against a man of the name, I think, of Spragge, for forging a note, which he afterwards got possession of and swallowed; and parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given. But there, indeed, it might be said, that such a notice would have been nugatory, as the thing itself was destroyed." See the case of *Rex v. Hunter*, a note, p. 128, and 3 C. & P. 591.

The counsel for the prosecution now proposed to read this deposition as evidence against the prisoner Haworth.

Starkie, for the prisoner, objected, that this deposition, being a statement made by the prisoner on oath, could not be received as evidence against him. (a)

*256] *Mr. Justice J. PARKE. I think that I ought to receive this evidence. The prisoner was not, at the time when he made this deposition, charged with any offence; and he might, on that, as well as on any other occasion when called as a witness, have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him.

The deposition was read, and in it the prisoner stated, that, after he had obtained possession of the deed, he had burnt it, as he thought it of no value or consequence.

Mr. Justice J. PARKE. The prisoner having stated that he has destroyed the deed, you may now give secondary evidence of its contents.

A copy of the deed was then put in; but, as the person who had prepared it, denied that he had ever examined it with the original, the learned Judge said, that he thought there could hardly be a satisfactory conviction under these circumstances; and the prisoner was therefore acquitted.

Hardy and *J. B. Greenwood*, for the prosecution.

Jones, Serjt., *Starkie*, and *Milner*, for the prisoner.

(a) "The account given by a prisoner [on his examination before a magistrate] ought to be taken without oath. If the prisoner has been sworn, his statement cannot be received; and if the written deposition of a prisoner purports to have been taken on oath, evidence is not admissible for the purpose of showing that in point of fact he was not sworn." 1 Phill. Law of Ev. ch. 5, sect. 5. It should be observed, that this relates to the examination of the person immediately under accusation. However, in a case tried at Worcester, where it appeared, that a coroner's inquest had been held on the body of A., and it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. upon oath as a witness. Park, J., would not allow the deposition of B., so taken on oath on the coroner's inquest, to be read in evidence on the trial of an indictment afterwards found against B. for the same murder.

*257]

*COURT OF COMMON PLEAS.

ADJOURNED SITTINGS IN LONDON, BEFORE HILARY TERM, 1830.

BEFORE MR. JUSTICE GASELEE,

(Who sat for the Lord Chief Justice.)

PICTON v. JACKMAN. Jan. 22.

In an action of slander, where three witnesses were called for the plaintiff, the evidence of two of whom was quite inconsistent with the notion of a confidential communication, it was held, that it was not a misdirection in the Judge, to leave it to the Jury to say, whether or no they believed the communication to be confidential; and that it was not necessary in such a case for him to tell them, in distinct terms, that, if they believed the evidence, they must find their verdict for the plaintiff.

SLANDER. The declaration stated, in substance, that the plaintiff, at the time of the grievance complained of, carried on the business of a wine merchant, in London; and that the defendant spoke of him certain words, imputing that he was a swindler, &c.; in consequence of which certain persons, who would otherwise have sold him wine on credit, refused so to do, &c. Plea—Not guilty.

Three witnesses were called on the part of the plaintiff. The first was a wine

broker, who went to inquire for the plaintiff's address, he having been tenant to the defendant. The defendant was stating several things to him in disparagement of the plaintiff, when the witness told him that he did not come to inquire into his character, as he had done business with him before, but merely came to know where he had removed to. The defendant, however, notwithstanding this, continued his remarks, and used the words stated in the declaration, saying, at the same time, that he spoke in confidence. The witness thanked him for his remarks, and declined trusting the plaintiff with any wine. The second witness went for the purpose of inquiring into the plaintiff's respectability, and received from the defendant several statements imputing dishonesty to the plaintiff. The third witness was a person who called for *a gauge [258 which he had left at the plaintiff's premises. It appeared that the plaintiff, at the time of the trial, was a prisoner for debt in the King's Bench Prison.

Taddy, Serjt., for the defendant, contended that it must be taken, that the witnesses really went for the purpose of inquiring into the plaintiff's character, although they might not have said so; and therefore that the Jury must be satisfied of the existence of malice in the defendant, before they could find a verdict for the plaintiff.

GASELEE, J. (in summing up), observed—If what is said is in confidence, upon application made, or reasonably induced from that which takes place, there is not evidence of that malice which is necessary to support an action of slander; and if that was the case in the present instance, then the defendant will be entitled to your verdict. If the case had been proved as opened, you would have been relieved from the consideration of that question; because it was opened that the defendant was angry, and had expressed an intention of going about to stop the plaintiff's credit. But no evidence has been given of this. (a) It is argued on the part of the defendant that what was said to the first witness was not volunteered by the defendant, but it is for you to consider how far that was the case. The witness said (as every man would say, when he had received information) that he was much obliged to the defendant for what he had told him. If you are satisfied that the plaintiff was the person he was represented to be, or that the defendant believed him to be such, that will be sufficient. It is true, there is no evidence of his being such, except the defendant's statement that he was a sufferer by him, and the fact, that the plaintiff is *now in the King's Bench prison. The question for you will be, whether [259 you are satisfied that this was a *bonâ fide* confidential communication, for the purpose of putting people on their guard against the plaintiff. If you think it was, you will find your verdict for the defendant; but, if you think it was not, you will find a verdict for the plaintiff, and give him such damages as you think he ought to receive.

While the Jury were considering their verdict—

Wilde, Serjt., called his Lordship's attention to the evidence given by the first and third witnesses, and submitted, that, upon their testimony, there was nothing to go to the Jury with respect to its being a confidential communication.

The Jury in the mean time returned a verdict for the defendant, and—

GASELEE, J., afterwards said, that he doubted if they were justified in finding such a verdict upon the evidence; and also, whether he should not have told them, that if they believed the evidence, their verdict must be for the plaintiff. His Lordship expressed a wish, that, in order to prevent the case coming down again, the defendant's counsel would consent that the Jury should reconsider their verdict.

This, however, was not agreed to, and the verdict was recorded.

(a) Wilde, Serjt., in stating the plaintiff's case, did open the evidence referred to by his Lordship, but the witnesses, who were to have proved it, being called on their subpoena, did not appear.

Wilde, Serjt., and *Payne*, for the plaintiff.

Taddy, Serjt., and *Hutchinson*, for the defendant.

[Attorneys—*B. Whittington*, and *Phillips*.]

In the ensuing Hilary Term, *Wilde*, Serjt., obtained a rule nisi for a new *260] trial, on the ground of misdirection; *which came on to be argued in the Trinity Term following: when the Court were of opinion, that there was no misdirection, but that the verdict was against evidence, and directed a new trial, on payment of costs, if the parties would not agree to a *stet processus*, which latter course they strongly recommended.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1830.

BEFORE LORD CHIEF JUSTICE TINDAL.

GRAY v. CHAMBERLAIN. Feb. 13.

A. applied to B. (the proprietor of a house, with cellars, which he was in the habit of letting), telling him that he wanted cellar room to do a *pipe* of wine, but adding, that he did not know but very shortly he might want a good deal of room; B., upon this, said that he had better put it into his (B.'s) own cellar; which he did:—Held, that under these circumstances, B. was entitled to detain the wine, till a *reasonable and proper* sum had been paid him for rent.

TROVER for wine. The defendant was the proprietor of a large house, which he let out, as well as of several cellars which were under it. The plaintiff, who was a dealer in wine, put a pipe of port into one of the defendant's cellars, part of which he bottled there, and sent out in bottle; and it appeared that upon his desiring to remove the rest, the defendant refused to let it go, unless he was paid a sum of five guineas for rent. The plaintiff said, that he would not pay five guineas, but would pay what was right, and what other people would charge. The defendant replied, that he would not let any more go out of the cellar till the rent of five guineas was paid.

It appeared that the usual charge made by wine coopers for cellar room for wine, was at the rate of sixpence *per month per pipe*. It was proved, that the wine in question was in the cellar in the month of December, 1828; but no evidence was given as to when it was first put there; and it was proved, that, in the latter end of October, or the beginning of November, 1829, the plaintiff tendered to the defendant the sum of 2*l*. The cellar was a private cellar, and a witness for the defendant stated, that, when the plaintiff made application to *261] the defendant, he said, that he *then only wanted cellar room to do a *pipe* of wine, and that he did not know but very shortly he might want a good deal of room. Upon which the defendant said, that it would be better to put the wine into his (the defendant's) own cellar.

Wilde, Serjt., for the defendant. As it appears that the wine was in the defendant's cellar, and that the cellar room was to be paid for, his claiming a right to *hold* till the rent was paid, but not claiming any right *in the wine*, cannot be considered a conversion, unless there was a tender of the full sum due. And it is for the plaintiff to show that he has tendered enough; and, for that purpose, he must show when the wine was put into the cellar, and it is not enough to show that it was there on a certain day.

Jones, Serjt., for the plaintiff. There is no lien in this case; a lien must be either by express contract or by custom of trade, or in respect of labour bestowed. I do not expect to hear it laid down, that, in such a case as this, a lien

can be established. If it were so, it would be highly inconvenient for trade. The question is, whether a tradesman's goods of the value of a thousand pounds may be detained till a small sum of 4*l.* or 5*l.* is paid. The tender does not admit the lien or the amount, but was made for the sake of caution, and for peace, to prevent a lawsuit.

TINDAL, C. J. I think, in point of law, that upon this evidence there is a lien for a reasonable sum. We must take the evidence as it is; we find the wine in the cellar in the month of December; and in the absence of any evidence as to when it came, I think I must take it as if it came at that time. The rule "*de non apparentibus*" applies to this case. I do not see how I can presume that it came at any other time. The first question will be, whether, when the wine was put into the cellar, it was the contract and understanding of the parties, that it should remain till a reasonable sum was paid. Without going into *the general question, as to the cases in which a lien is allowed, it [*262 will be for you to say, on the evidence in this particular case, was the wine put into the cellar on a contract and understanding, that it should not be removed till a proper sum was paid. If you think that it was, then that will introduce the second question, whether a reasonable and proper sum has been tendered; and that will depend upon whether the parties contracted on the terms which would have been adopted in the case of a wine cooper; for if they did, then a sufficient sum, undoubtedly, has been offered. But if it was not so, then it will be for you to say how much ought, under the circumstances, to have been paid.

Verdict for the plaintiff.

Jones, Serjt., and *Joshua Evans*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attorneys—*Molloy*, and *Tucker*.]

ADJOURNED SITTINGS IN LONDON, AFTER HILARY TERM, 1830.

BEFORE LORD CHIEF JUSTICE TINDAL.

DANIELS v. POTTER, WING, ASHLEY, and FITZWATER. Feb. 22.

A tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it.

In an action for an injury to the person, occasioned by the negligent and careless placing of such flap, the declaration of one defendant, who has suffered judgment by default, cannot be used as evidence against the other defendants.

THE declaration stated, in substance, that, at the time of the grievance complained of, the defendants were in the act of putting a hogshead of wine into a cellar in the public street, and that the flap of the cellar was so *negligently placed, that it fell upon the plaintiff, and injured his leg. [*263

The defendants, Potter, Wing, and Ashley, pleaded the general issue; the defendant Fitzwater suffered judgment by default.

It appeared from the evidence on the part of the plaintiff, that the defendant Potter (who was dead at the time of the trial) was a tobaccoist and wine merchant, carrying on business in High street, Aldgate; that between four and five o'clock in the afternoon of the 20th of February, 1829, the plaintiff, who was a boy of about eleven years of age, was returning with his brother, a year or

two older than himself, from the Minories, where they had been sent on an errand; and that they were waiting near Mr. Potter's premises, for an opportunity of crossing over to go to Duke's Place, where they lived, when the flap of a cellar under Mr. Potter's warehouse (into which the other three defendants, two of them being wine coopers, and one a porter, were letting down a hogshead of wine) fell upon him, and broke one of his legs. The flap was placed in a slanting position, on a projecting ledge, about a foot above the pavement. It was not fastened in any way, but leaned partly against the window of Mr. Potter's warehouse, and partly against that of his next door neighbour. One of the plaintiff's witnesses said, that it was placed in such a manner, that the passing of a stage coach or a heavy wagon might have the effect of shaking it down.

Taddy, Serjt., in the course of the plaintiff's case, mentioned, that he should give in evidence a statement made by the defendant Fitzwater, who had suffered judgment by default, and added, that he proposed to use it, not only as evidence against him, but also against the other defendants. He referred to Phillips on Evidence, Vol. 1, p. 94, where the case of *Rex v. Hardwick* is cited, and stated to have laid down, that although an admission by one of several defendants in *264] trespass will not establish the others to be co-trespassers; yet if that is proved by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object.

TINDAL, C. J. It seems to me, that the words used have reference to a case in the nature of conspiracy.

Taddy, Serjt. In every action of tort, if there is evidence of a joint act of trespass, the admission of one defendant seems, according to the case of *Rex v. Hardwick*, to be admissible against all. The plaintiff could not call the defendant as a witness, because his interest is such, that his declarations are evidence without; and a party cannot be placed in such a situation, as that his statements of the facts are not to be used in any way.

Wilde, Serjt. In the same page of Phillips on Evidence it is said, after mention of *Rex v. Hardwick*, "Perhaps, on consideration, it may appear that the rule is to be understood with some limitation; and, from analogy to the principle established by the greatest authorities in cases of conspiracy, the true limitation of the rule appears to be this, that such declarations only are admissible, as have been made with reference to the concerted plan, and in pursuance of the common object; and that declarations, which have not been made with reference to that object, and are not strictly a part of the transaction in question, cannot be admitted as evidence against co-trespassers."

TINDAL, C. J. The statement is no doubt evidence, for one purpose, against the person himself, because the Jury have to say what damage has been sustained; but the plaintiff wishes to go farther. It seems to me, the authority relied on, on both sides, applies to a case where there is a common object to be *265] furthered; but here there was no common object, it is mere negligence. The evidence is certainly admissible, and you will hear how I shall leave it to the Jury. I think you will find that which I have stated to be the legitimate distinction. You must make the parties joint agents for one common object, before you can make the declarations of one, who has suffered judgment by default, evidence against the others.

The declaration of Fitzwater, which was taken down in writing, was then read; it contained, among other things, an admission, that there was room enough in the shop to have put the flap within it; that no boys were playing with it; that coaches and carts were passing at the time it fell; and that several persons were waiting to cross over.

Wilde, Serjt., for the defendant. The question is, whether the two defendants, Wing and Ashley, have been guilty of negligence. The declaration avers, that it was the duty of the defendants so to place the flap as not to injure any of the king's subjects passing along the highway; and that they, not regarding their duty, so negligently, carelessly, and improperly placed it, that, by reason

of their negligence, it fell upon the plaintiff and injured him. Persons who have to receive large goods, cannot carry on their business in London, without some partial inconvenience to the public. But the question here is, not as to such inconvenience, but whether, in this particular case, there has been negligence in the using a particular thing. I submit that the defendants were only bound to use reasonable care; and if I show that boys were playing with the flap, and were told not to touch it, but continued to do so, that will discharge the defendants from the imputation of negligence.

Witnesses were then called on the part of the defendant; and, according to their statements, the flap was pulled over by some boys who were playing about, and who were warned by the men in the shop, but would not go away.

*It also appeared that the flap had been placed in the same way for many years, and that no accident had happened before. [*266]

Taddy, Serjt., in reply. The question is, whether the flap was placed in a secure position; if it was, considering its weight, could a little boy have pulled it over? The defendants are responsible to the public, if they did not place the flap in a secure position. It may have been placed securely on every previous occasion; but if it was not so on this, the plaintiff must have a verdict.

TINDAL, C. J. (in summing up), said—The defendants were bound, in placing the flap, to use such precaution as would preserve it, under all ordinary circumstances, from falling down; but if it was so secured, and a third person, over whom they had no control, came and removed it, then I think the defendants will not be liable. The plaintiff says, that the flap fell in consequence of the negligence of the defendants; the defendants' case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff: and your verdict will be for the plaintiff or defendants, according as you believe the one or the other of these stories. There is no doubt as to the law of the case. The defendant Potter had, it seems, been in the habit of using the cellar for several years, and the limited right to use it for the purposes of trade cannot come in question. But though this be the case, yet the party using it is bound to take such reasonable care in the fixing up and securing the flap, that, in the ordinary course of things, no injury shall happen to any of the public passing by. The question for your consideration will be, whether, upon this occasion, the two servants of Mr. Potter, Wing and Ashley, who are the only persons now to be affected (as Mr. Potter is dead, and Fitzwater has suffered judgment by default), did use due and ordinary care in placing up this flap, so as to prevent any accident from happening. It *might certainly have been secured by a string, or by a hook, [*267] or by some person holding it, if that were necessary to the security of it. A tradesman, under such circumstances, is not bound to adopt the strictest means, but he is bound to use such care as any reasonable man, looking at it, would say was sufficient; and if he does use such care in the placing of the flap, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable in an action; but the party must look for compensation to such wrong-doer who so displaced it. With respect to the admission made by Fitzwater, I do not think you are at liberty to make use of it as against the other defendants.

Verdict for the plaintiff—25*l*.

Taddy, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., and *Malkin*, for the defendants.

[Attorneys—*L. Jacobs*, and *Martin*, A. & S.]

ALLPORT and Another v. MEEK. Feb. 24.

In an action by the endorsee against the acceptor of a bill of exchange, the witness called to prove the handwriting of the drawer stated, that neither the drawing nor endorsement were of the handwriting of the person whose they purported to be. But it was proved that the defendant had acknowledged the acceptance to be his, and it was contended, that, as the acceptance admitted the drawing to be correct, the Jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and endorsement were of the same handwriting. But it was held to be necessary, that some proof should be given as to whose the handwriting was.

ASSUMPSIT on a bill of exchange drawn by one Williams on and accepted by the defendant, and endorsed by Williams to the plaintiffs.

The witness who was called to prove the handwriting of Williams, said, that neither the drawing nor the endorsement were written by him, and that he did not know by whom they were written.

Wilde, Serjt., for the plaintiffs, then proved that the defendant had acknowledged that the acceptance was his; and submitted to his Lordship, that, as the *268] acceptance *admitted the drawing to be correct, the Jury might look at the endorsement, to see whether it was of the same handwriting as the drawing. The reason why a witness is not allowed to speak to handwriting by comparison is, that it is the province of the Jury; and it has been decided that the Jury may judge by comparison.

TINDAL, C. J. I think you must call some witness to lay some evidence before the Jury on which they may decide.

Wilde, Serjt., admitted, that he could not carry the case any further, and the plaintiffs were Nonsuited.

Wilde, Serjt., and R. V. Richards, for the plaintiffs.

Storks, Serjt., for the defendant.

[Attorneys—Edwards & H., and Roberts.]

Vide the case of Jones and others v. Turnour, *ante*, p. 204; and the case of Cooper v. Meyer, 1st Lloyd and Welsby's Commercial Cases.

WOOD v. ADAM. Feb. 24.

The declaration in slander stated, that the defendant, intending to injure the plaintiff in the opinion of certain persons, who had been in the habit of employing him as a fruit broker, represented to those persons that the plaintiff had prejudiced the sale of a cargo of oranges belonging to them, by reporting, in the sale room, that *he* (the plaintiff) *had* three or four ships laden with fruit between Gravesend and London. The proof at the trial was, that the plaintiff had said, that *there were* three or four ships laden, &c. This was held, *at Nisi Prius*, to be a fatal variance; and the plaintiff was nonsuited, and the nonsuit was confirmed in the Court above, a rule for setting it aside being refused.

THE first count of the declaration stated, that the defendant had been retained and employed by certain persons under the style and firm of Messrs. John Pirie & Co., in the selling and disposing of a certain cargo or large quantity of fruit, to wit, of oranges, for the said Messrs. John Pirie & Co.; and upon that occasion the defendant *had sold and disposed of the said oranges for the *269] said Messrs. John Pirie & Co., at and for certain prices, &c., in a certain sale room, &c., and thereupon afterwards, to wit, on the 1st of March, &c., in a certain discourse which the defendant then and there had with one John Pirie (the said John Pirie then and there being one of the persons under the said style or firm of Messrs. John Pirie & Co.), of and concerning the said sale and disposal, &c., he the defendant contriving and intending to injure the plaintiff, and to deprive him of the confidence and good opinion of the said Messrs. John Pirie & Co., and to cause the said John Pirie and the said Messrs. John Pirie & Co., to suspect and believe that the plaintiff had maliciously prejudiced the said sale of the said

oranges, and had been the cause of the same not having been sold for better prices; did then and there, &c., falsely, maliciously, and deceitfully represent and pretend to the said John Pirie, that if the plaintiff had not circulated, or caused to be circulated in the sale room, a report that *he* the plaintiff *had three or four vessels laden with fruit between Gravesend and London*, the cargo, a quantity of oranges of the said Messrs. John Pirie & Co., would have fetched better prices, thereby meaning, that the plaintiff had circulated, &c., a report that he had three or four vessels laden with fruit between Gravesend and London, and that the said report had prejudiced the sale, whereas in truth the plaintiff did not circulate, &c., nor had at the time of the sale any such vessels, &c. It then averred, that Messrs. Pirie & Co., in consequence of the representation, suspected and believed that the plaintiff had made the report, and therefore ceased to employ him in the capacity of a fruit broker, as they had been used to do, and still would have done, &c. &c. &c.

There were two other counts varying in the inducement and mode of setting out the words, but both of them stated the representation to be, that the plaintiff had said **that "he had several vessels laden with fruit, &c."* The defendant pleaded—Not guilty. [*270]

From the evidence it appeared that what the defendant represented the plaintiff to have said, was, that *there were three or four ships* laden with fruit between Gravesend and London.

Jones, and Stephen, Serjts., for the defendant, upon this contended, that the plaintiff must be nonsuited, as the proof varied from the statement in the declaration.

Wilde, Serjt., for the plaintiff, argued, that the variance was not material, and that the averment in the declaration was *substantially* made out.

TINDAL, C. J. I am of opinion that the declaration is not proved. The statement that *he had three or four ships*, is a very different statement from one that *there were three or four ships*; because the first statement, if false, must be false to his knowledge, whereas the other need not be so, but might consist of what he had heard, and might believe to be correct. I think the plaintiff must be called.

Nonsuit.

Wilde, Serjt., and Hill, for the plaintiff.

Jones, and Stephen, Serjts., for the defendant.

[Attorneys—*W. G. Bolton, and Brown & Marten.*]

In the ensuing Easter Term, a motion was made for setting aside the nonsuit; but the Court Refused a rule.

*POSTAN v. ROSE. Feb. 26.

[*271]

Practice.—Time for subpoenaing a witness domiciled in London, to give evidence in a town cause.

ASSUMPSIT for work and labour as a surveyor. Pleas—General issue, and a tender.

Andrews, Serjt., applied on Friday, the 26th of February, on the part of the plaintiff, to have the trial of this cause postponed till the following Monday or Tuesday. He produced an affidavit, which stated, that on Monday, the 22d, application had been made at the house of Mr. Layton Cooke, a land surveyor and house agent, in Great Russell street, for the purpose of subpoenaing him as a witness on the part of the plaintiff. The person applying was told that Mr. Cooke was gone to Canterbury, but was expected in town that evening. He

went again at eleven o'clock in the evening, but found that Mr. Cooke had not returned. Mr. Cooke's servant was in Court; and it was stated that he was ready to make an affidavit that his master was not yet returned, but was expected to be in town by Monday the 29th.

It appeared that Monday the 22d was the first day of the Sitting, and that the cause was the 26th common Jury in the printed list of causes, and was in the written paper of Thursday the 25th.

Wilde, Serjt., for the defendant, submitted that it would form a very dangerous precedent if the application were to be granted. Causes must, according to the rules of the Court, be entered at least two days before the day of sitting; and as this cause stood so early in the paper, the application to the witness ought to have been made sooner. As his business was that of a land surveyor, it was to be presumed that it would often require him to be absent from London.

*272] *Andrews*, Serjt., replied, that inasmuch as the witness *was domiciled in London, the application on the 22d was sufficiently early; if he had been living in the country it might have been too late.

TINDAL, C. J. It seems to me, that, in this case, the plaintiff has not brought himself into the ordinary situation in which we are in the habit of granting the indulgence required. If he had subpoenaed the witness, and it appeared that from any sudden cause he was not able to attend, then he might have been entitled to the postponement of his cause. But here, the plaintiff has thought proper to wait till the Monday, before he made any application. And in addition to this, if on the Monday evening he had sent a subpoena to an attorney at Canterbury, he might have been able to obtain the attendance of the witness. It seems to me too much of a speculation, and therefore I cannot allow the postponement; but the plaintiff must be put to withdraw his record.

The plaintiff elected to go on with his case, and the verdict eventually was for him.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attorneys—*Russen*, and *Evans & H.*]

*278] *PHILLIPS v. WIMBURN, Gent., &c. Feb. 27.

It is to be presumed, that what is stated *on oath* before a magistrate, is taken down in writing; and, therefore, parol evidence of such a statement is not receivable, unless it be first shown that it was not so taken down.

ASSAULT and false imprisonment. Pleas—The general issue, and several special pleas of justification.

A witness for the plaintiff proved a dispute, and charge given to a constable, who took the plaintiff to a police office; and he stated that the defendant was sworn, and stated his case at the office against the plaintiff. The witness was commencing his account of what the defendant said, when—

Russell, Serjt., objected that the parol evidence was not receivable, as the presumption of law was, that what took place at a police office was taken down in writing.

TINDAL, C. J., was of that opinion.

The witness being asked, said, that he did not see anything taken down in writing.

Wilde, Serjt., submitted, that, as a general rule, it would be inconvenient to hold that there was a general presumption of law, that statements were taken down in writing, when the witness said, that he did not see that anything was so taken down.

TINDAL, C. J. I think, that, when it appears that a witness was sworn, we must presume that what he said was taken down in writing. Sometimes a party

goes into a police office and states a complaint, which goes off without his being sworn, and then it may not be taken down in writing. You may call the magistrate's clerk, and he will tell you whether there was anything taken down in writing or not.

Verdict for the plaintiff.

* *Wilde*, and *Andrews*, Serjts., and *Ryland*, for the plaintiff.

Russell, Serjt., and *Miller*, for the defendant.

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[Attorneys—*Thwaites*, and *In Person*.]

Vide *Rex v. Hollingshead*, *ante*, p. 242.

ANDREWS and Another v. PLEDGER. *March 1.*

Where a defendant pleads that he was "duly discharged" under the Insolvent Debtors' Act, and the plaintiff in his replication denies the discharge *modo et forma*, it is sufficient for the defendant to prove the order of adjudication for his discharge, and it is not necessary to prove the fact of his having filed his petition, although that fact is essential to give the Court jurisdiction.

ASSUMPSIT on a bill of exchange against the defendant, as acceptor. There was no plea of the general issue, but only a plea of a discharge under the Insolvent Debtors' Act. Replication, denying that any such discharge took place.^(a)

On the part of the defendant, a certified copy of the order of adjudication for the discharge of the defendant was put in, and that part of his schedule was read which contained the entry of the bill on which the action was brought.

Andrews, Serjt., for the plaintiff, submitted that the filing of the petition must be proved. Without that, the Court have not jurisdiction. The defendant is bound to show that all that was necessary to entitle him to his discharge has been done. This case differs from that of *Delasfield v. Freeman*,^(b) as that was a question of the *title of the assignee to sue, and this is the case [275] of a special plea by the insolvent himself.

On the part of the defendant, the 61st^(c) section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, was referred to.

Andrews, Serjt. The 76th section applies to this case, and if that section, after stating that certified copies of the petition, order, &c., shall be admitted in evidence, went on to say, "and that such evidence alone shall be sufficient," that might make the proof which is offered in this case do; but it would be going a great way to say, that, without those words, the things necessary to give the Court jurisdiction must be taken to be dispensed with. The 61st section does not control those sections which require the filing and signing of the insolvent's petition.

TINDAL, C. J. It strikes me in this way. You must be taken to have admitted all that you do not put in issue by your replication. The ground on which I decide is, that, upon the issue which is raised by your replication, the filing of the petition must just as much be taken to be admitted as any other fact not specifically denied.

Verdict for the defendant.

Andrews, Serjt., and *Channell*, for the plaintiffs.

Wilde, Serjt., and *Comyn*, for the defendant.

[Attorneys—*Tilson & Son*, and *Howard & J.*]

(a) The plea and replication were in the same form as those in the case of *Northam v. Latouche*, *ante*, p. 140, the plea merely alleging that the defendant, "by a certain order of adjudication," &c., was "duly discharged according to a certain Act of Parliament," &c., and the replication, stating that the defendant "was not discharged in manner and form" as in the plea alleged.

(b) 6 Bing. 294, and *ante*, p. 67. One of the points decided in that case was, that the production of the insolvent's petition was not necessary to support the title of the assignees.

(c) *Vide* *Northam v. Latouche*, *ante*, p. 140, where that section is set out. It provides, in effect, that a defendant may plead generally, that he was duly discharged, and that the plaintiff may reply generally, and deny the matters pleaded, or reply any other matter which may show the defendant not to be entitled to the benefit of the Act, or that he was not duly discharged.

*276]

*SOMES v. SUGRUE. April 20.

The captain of an insured ship, which has been injured by perils of the seas, is not justified in selling the ship instead of repairing it, unless he either has not the means of getting the repairs done at the place where the vessel is obliged to put in; or cannot get them done, except at such an expense as would render it undoubtedly improper to repair, if the ship were not insured; or has not money in his possession, sufficient to pay for the repairs, nor is in a situation to raise it by loan or otherwise, except at such an extravagant rate as would prevent a prudent man, in the exercise of a sound and vigorous judgment, from undertaking the repairs under such circumstances.

ACTION on a policy of insurance for 3,000*l.*, on the ship *Sir Godfrey Webster*, valued, with her stores, at 6,000*l.*

A sum of money had been paid into Court.

The plaintiff was the owner of the vessel in question, and the defendant was one of the members of the *Saint Patrick's Assurance Company*.

On the part of the plaintiff, the mate was first called, from whose evidence in chief the following facts appeared. The *Sir Godfrey Webster* sailed from the cove of Cork, in June, 1825, on a voyage to New South Wales, with convicts. Her course, after delivering the convicts, was for Singapore, thence to Penang, and thence to London. She had bad weather after she left the Cape. She arrived at Sidney in the month of January, 1826. Having suffered from the weather, she was surveyed at Sidney by three respectable persons, and the quarter galleries were taken away, and the quarters new planked, and there was some fresh caulking. When she left Sidney for Singapore (where she arrived in May, 1826, after a fine passage), she was quite sea-worthy. At Singapore she was surveyed again by the agent for the charterers, and she was there caulked in the gun-deck. She took in part of her cargo at Singapore, consisting of sugar, coffee, antimony, &c., and the remainder she took in at Penang. Her cargo was well stowed, and she was not very deep in the water. After she left Penang, about the end of June, 1826, she encountered heavy squalls, of five or six hours' duration, with a confused sea, and she laboured and strained a great deal. This weather lasted nearly the whole of July, and, towards the middle of August, heavy gales came on. She then made water, commencing

*277] with about four or five *inches per hour, and increasing as high as fourteen inches. On the 14th or 15th of August, a consultation was had between the captain, the mate, the second officer, and the carpenter, and it was resolved that it would be dangerous to pass the Isle of France, and therefore that it would be best to bear up there; the ship was then very weak and worked much, the top apparently moved from side to side. At Port Lewis, a person named Alexander Asher, was employed as agent for the ship, and on the 21st of August, a survey was made by Ambrose, a surveyor, Royer, the harbour-master there, and Hutchinson, the captain of a merchant ship. The vessel was then in a very awkward state outside; several butts had started at the main chains, and some planks had started off, and the larboard side of the main chains had the appearance of being logged; several of the seams were open, and the oakum was nearly all washed out. In consequence of this, about eight or nine days after, part of the cargo was taken out, and a fresh survey was made of the inside. Between the surveys the captain died, and the command devolved upon the mate. Upon this second survey, it was discovered that several of the iron standards of the gun and orlop decks had started, and some of the beams of the gun-deck were broken, and the deck itself had partially sunk about the main hatchway, and also that several of the ship's knees were broken. A third survey was thought necessary, and Captain Hutchinson having left the harbour, a Mr. Brooks, the master of a brig, surveyed in his stead. Upon this third survey, which took place on the 7th of September, the remainder of the cargo was taken out, and it was found that about a third of the whole number of knees had been broken. There was an establishment on the island for the repair of vessels, which was called Piston's Establishment, the manager of which came on board after this survey; he estimated the expense of the necessary re-

pairs at 16,000 dollars (about 4,000*l.* sterling): the *mate asked whether the proprietors of that establishment would enter into a written agreement to do the repairs mentioned in the estimates for the sum of 4,000*l.*, and the answer was, that they would not; because they feared, that when they began to strip the vessel, they should find more defects than they actually saw then. He afterwards asked them to fix a further sum, which they declined doing. The wages of shipwrights were from three to four and a half dollars *per day*. On the 10th of September, a person named Warwick, a ship-builder, surveyed the ship, and his opinion was, that she was very much injured, apparently by straining, and that, from her general appearance, *she would require repairs far exceeding her value*. The mate said, that he required a written agreement, because he understood that they would otherwise run him up to an enormous sum, as everything was very high; that he was willing to sanction 4,000*l.*, but thought it would amount to 8,000*l.* or 9,000*l.*; that Captain Hutchinson and Asher *advised him not to repair without a written agreement*, in consequence of the high charges, saying, that if he got the ship safe home, she would not fetch as much as the amount of the repairs; that Mr. Warwick also advised him to abandon the ship, which he did very soon after his survey; that he had no motive but the good of all concerned, and did not know at the time whether she was insured or not.

On his cross-examination, the mate admitted that the register tonnage of the ship was between 500 and 600 tons; that before he applied to Warwick, he had applied to a person named Correaux, who was the person that afterwards bought the ship; that he had never been at the Mauritius before; that he had, after the 14th of August, made several additions to previous entries in the log, as to the state of the weather, &c., and that when he saw the ship after she had been partly broken up, "*the timbers were very good*," although the ship generally was "*in a deplorable state*."

*Captain Hutchinson was also called on the part of the plaintiff, and he stated, that he believed that the rate of borrowing on bottomry, at the Mauritius, was 16*l.* or 17*l. per cent.*; that the rate of repairing there was most extravagant; and that he thought it was better to sell the ship than to repair her there, (a)

The extravagant rate of charge for repairs was also proved by a Captain Weller; who stated, that the masts, which here would have cost about 600*l.* could not have been obtained there for less than 1,600*l.*

In addition to this evidence, Mr. Hillman, the surveyor to the East India Company; Captain Hurd; Mr. Pitcher, a ship-builder at Blackwall; and Sir Robert Seppings, surveyor to his Majesty's navy, were called as witnesses; and from their evidence it appeared, that in their opinion it was not advisable to repair the ship, considering the nature of the damage done, and the expense of repairing at the Mauritius, and the high rate at which money was to be obtained on bottomry. One of them said, that in his opinion it would have been madness to have repaired. They also thought, that heaving down would be necessary to render the ship sea-worthy; and this, it was stated, could not be done at the Mauritius, because there was not any dry dock there. The expense of heaving down was not included in any of the surveys.

Wilde, Serjt., for the defendant. The question is, whether this is a total loss or not. The ship is insured in 8,000*l.* by this policy; in 8,000*l.* by another policy; and in 5,000*l.* on the freight. It must be taken to be of the value *of 6,000*l.*, because it is so stated in the policy; and if it could have been repaired at the Mauritius at an expense of 4,500*l.*, or thereabouts, it ought to have been, and then it would have earned its freight of 5,000*l.*, which.

(a) Captain Hutchinson, in the course of his cross-examination, gave some extraordinary evidence. He said, that at the Mauritius he had seen from the shore vessels at sea when they were 300 miles distant; that he saw the vessel in question three days before she arrived, and described the appearance of her sails; he added, that he believed vessels had been seen twelve days before they came in, but he could not give any reason for it. It was suggested, that it might arise from the very great refractive power of the atmosphere in those parts.

adled to its value, would have made 11,000*l*. I submit that nothing will justify a sale, but a case of *necessity*. In *Idle v. The Royal Exchange Assurance Company*, 3 J. B. Moore, 115, it was decided, that a sale was justifiable, because it was *prudent* to sell, and would have been imprudent to repair; but, on a writ of error, that decision was reversed, on the ground that to justify a sale it must be shown that it was *necessary* to sell. It appears, from the admission of the mate, that when the ship was broken up, the timbers were found to be sound. The supposition, that more would be found requisite, on opening the ship, than the surveys provided for, is not a sufficient ground of abandonment. If it were so, there is no ship that might not be abandoned. Every average loss may be turned into a total loss, if we are not to act upon the surveys of honest men, selected at the time by the captain, but upon the impressions of witnesses at the trial. Although the mate did act for the best, and honestly, yet, if you think that there was *no necessity for selling*, the defendant will be entitled to your verdict. The plaintiff cannot make out, that if the vessel had not been insured, the owner could have shown that it was for his interest to sell; and he has no right to do otherwise because he is insured, than he would have done if he had not been.

On the part of the defendant, the examination on interrogatories of Ambrose and Royer, two of the persons employed to make the surveys, were read, as also those of Bassett, the manager of Piston's Establishment, Courreaux, the person who bought the vessel, Biggerand, also of Piston's Establishment, and Tate, the *281] carpenter of the vessel. They differed in their notions of the sum that *would have been necessary to make the vessel sea-worthy, but thought she might have been made fit to bring her cargo to England, and that the repairs mentioned in the surveys would have been sufficient for that purpose. Bassett estimated the expense at 16,000 dollars, Royer at about 20,000. Biggerand thought that 16,000 dollars would have done, allowing 500 for any extras not found out at the time. Tate, the carpenter, was of opinion that a *smaller degree of repair*, which might have been done for about 12,000, would have enabled the vessel to carry *part* of her cargo to England. It appeared that Bassett, in answer to one of the cross-interrogatories, had said, that he could not say whether the ship, when repaired, would be worth the expense of repairing her. Mr. Sanders, one of the proprietors of Piston's Establishment, was called as a witness, he said, that at the time when the vessel in question was at the Mauritius, a part of the cargo could easily have been sold to raise money for the repairs: he added, that at that time the exchange for bills was 4*s*. 3*d*. the dollar, but for bottomry, 25*l*. *per cent.* was charged, and if an agent were employed to raise the money, 2*l*. or 5*l*. *per cent.* more would have to be paid him.

Taddy, Serjt., for the plaintiff. My brother *Wilde* has taken much too narrow a view of the question of law. In subsequent cases to those which he has cited, the question has been decided to be this, *whether* or no the ship was *worth repairing*. *Allen v. Sugrue*, 8 B. & C. 563, *Atkinson v. Clarke*. (b) But supposing it to be, whether the sale was *necessary*, if, as one of the witnesses for the plaintiff said, it would have been madness to have repaired, there was that necessity, and that state of circumstances, which will render it a total loss. Every ship may be repaired, whatever its state; but the question is, whether there is *282] such a state of circumstances, that no prudent man in his *senses would set about repairing. The mate was in great uncertainty as to the amount of the expense. One said 16,000 dollars, another 20,000, another only 4,000 or 5,000, and another 40,000 or 50,000. This shows either the infirmity of human judgment, or that these persons were looking at the matter in very different points of view. One might have in view the doing merely enough to enable the vessel just to get through her voyage, and another might contemplate the putting her into a perfect state of repair. But the mate not only was in great uncertainty as to the amount of expense, but he also found that money

(2) *Vide also Cambridge v. Anderdon*, 2 B. & C. 691, and 1 C. & P. 213.

could not be raised except at a most extravagant rate. He would not have been justified in raising money at that rate, particularly when he found that Piston's Establishment would not bind themselves, in writing, to do the repairs at the sum specified. We are not at liberty to take the other policies into consideration. All you are to look at is the state of the vessel itself. The mate knew nothing about any policy. The valuation at 6,000*l.* in the present policy includes the stores, as well as the ship and sails, and the premium of insurance, which is 480*l.* If you believe the witnesses, it would really have been madness to attempt to repair under the circumstances.

TINDAL, C. J. The only question in this case is, whether, under the circumstances, there has or has not been a total loss of the vessel, if at all, in consequence of the sale, and that will depend upon whether the sale was a sale that was *necessary*, for the benefit of the parties concerned. A great deal has been said about the word *necessity*. Undoubtedly, it is not to be confined to, or so strictly taken as it is in, its ordinary acceptation. There can, in such a case, be neither a legal necessity nor a physical necessity, and therefore it must mean a *moral necessity*: and the question will be, whether the circumstances were such that a person of prudent and sound mind could have no doubt as to the course he ought to pursue. The *points principally for consideration will be, the expenditure necessary to put the ship into a condition to bring home her cargo; the means of performing the repairs, and the comparison between those two things and the subject-matter which was at stake; and it must not be a mere measuring cast, not a matter of doubt in the mind, whether the expense would or would not have exceeded the value; but it must be so preponderating an excess of expense, that no reasonable man could doubt as to the propriety of selling under the circumstances instead of repairing. A mere fear operating on the mind of the captain, that, if he did not bind the parties down, they would run him up beyond a certain sum, will not be sufficient, unless you are satisfied that it was the necessary consequence of the state of circumstances in which he was placed. A man is not, *quia timet*, so to compromise the interests of other persons, merely on the ground of what passes in his own mind. It seems, that in addition to the amount of surveys, a large expense would be incurred in heaving down the ship, and it will be for you to consider whether that was absolutely necessary for the purpose of making it sea-worthy. The question turns upon the possibility of making the ship sea-worthy within the limits in which it was, and not on whether the injuries were produced by the weather or not. His Lordship, after stating the substance of the evidence, observed—It comes round, I believe, to the question which I originally proposed. A captain has no power to sell, except from necessity, considered as an impulse, acting morally to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. If he has no means of getting the repairs done in the place where the injury occurs; or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done. In the present case, it appears that the vessel was in a place where the repairs could be done, and *where money could be obtained, although at an extravagant expense. Still the question is, whether the expenditure was so great that no prudent man, in the exercise of a sound and vigorous judgment, would hesitate as to the propriety of selling. If you think, that if the owner himself had been on the spot uninsured, he, in the exercise of a sound discretion, would have repaired the vessel; or that, if an agent of the underwriters had been there, he, exercising such discretion, would have repaired, then this captain ought certainly to have done so, but if they would not have done so, then I think this captain was not compellable to repair, and the sale in such case will have taken place under a justifiable necessity. Verdict for the defendant.

Taddy, and *Stephen*, Serjt., and *Alderson*, for the plaintiff.

Wilde, and *Spankie*, Serjt., and *C. R. Turner*, for the defendant

[Attorneys—*Baxendale & Co.*, and *Oliverson & D.*]

In the ensuing Easter Term, *Taddy*, Serjt., moved for a new trial, partly on the ground of misdirection, and partly on the ground that the verdict was against evidence.

The Court were of opinion that the case had been properly left to the Jury, but granted a rule nisi for a new trial, on payment of costs, on the ground that the verdict was against evidence.

Vide Read v. Bonham, 6 J. B. Moore, 397.

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*ISZARD v. MILNER. April 21.

Application was made on the part of the plaintiff to have a cause taken out of its turn, in order that it might be tried during the existing Sittings, on the ground that the defendant had died since the commencement of such Sittings. The application was opposed on the part of the defendant's executors, and refused by the Chief Justice of the Common Pleas, after time taken to consider.

ASSUMPSIT.

Wilde, Serjt., applied, on the part of the plaintiff, to have this cause taken out of its turn, in order that it might be tried before the next Term. He founded his application on an affidavit of the plaintiff and his attorney, which stated, that the action was brought to recover a sum of 192*l.* 4*s.* 5*d.* on a balance of account for work done as a builder by the plaintiff for the defendant; that issue was joined as of Michaelmas Term, 1829, and notice of trial given for the first Sittings in Hilary Term, 1830, and the cause made a remanet regularly from time to time; and that the deponents had been informed and believed that the defendant had departed this life since the commencement of the Sittings after Hilary Term.

Adams, Serjt., opposed the application, on the ground that the granting it might affect the rights of creditors. He stated, that he appeared on behalf of the defendant's executors, who had not yet proved the will, and were not in a situation to assent to anything. He submitted, that as the defendant was only considered to be alive by a fiction of law, but for which fiction there would be no question upon the subject, it was better to allow the matter to take its regular course.

TINDAL, C. J., took time to consider whether he would grant the application or not; and on coming into Court on the following morning, his Lordship said, that he had determined not to grant it, as it would not be fair towards the other suitors, to take a cause out of its turn merely upon such a state of circumstances.

Wilde, Serjt., for the plaintiff.

*286] **Adams*, Serjt., for the defendant.

[Attorneys—*Brown & Martain*, and *Wilde, R. & H.*]

The object in making this application was, to get a verdict before the termination of the Sittings, in order to prevent the death of the defendant from operating as an abatement of the suit, the defendant being alive at the commencement of the Sittings, and the Sittings being considered as only one day in law. (a)

(a) According to the case of *Taylor v. Harris*, 3 B. & P. 549, if a defendant die on the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon will be set aside upon application to the Court. The case of *Jacobs v. Miniconi*, 7 T. R. 31, decides, that the death of the defendant between the commission day and the day of trial, is not a ground for setting aside a verdict for the plaintiff. The case of *Ireland v. Champney*, 4 Taunt. 384, decides, that an action for libel abates by the death of the plaintiff after the signing of interlocutory judgment, and execution of a writ of inquiry, but before the next day in bank.

SAUNDERSON and Others v. BROOKSBANK and Another. April 21.

Where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk, in this form: "For agents of the R. V. B.—J. G." It was held to be no answer to a joint action against them by the endorsee of such a bill, to show, that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the endorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact.

ASSUMPSIT on a bill of exchange, which was in the following form:—

"Guernsey, 24th Feb. 1829.

"Three months after date, pay to the order of Messrs. Cheminant, Despres, & Co. 350*l.* sterling.

"N. R. CHEMINANT."

Accepted, "For agents for the R. V. B., J. Gould.—S. A." Endorsed, "Cheminant & Co."

*The defendants were charged as the acceptors; and in order to make out the case against them, a clerk from Hammersley's banking-house was called as a witness. He stated that the defendants, Messrs. Brooksbank and Morland had for several years kept an account at their house, as the agents of the Royal Veteran Battalion, and that the form of the acceptance in question was the usual form in which bills were accepted in connexion with that account, many of which he had paid. He added, that Gould, whose name was signed to the acceptance, had been for a considerable time the clerk who managed the affairs of the defendants.

The plaintiffs were bill brokers, who discounted the bill for a Mr. Wood, also a bill broker. The discount was proved to have taken place in the ordinary course of dealing between bill brokers, without the name of the party for whom it was done being put upon the back of the bill.

It appeared that Wood had made inquiries in different quarters as to the respectability of the defendants, but that neither he nor the plaintiffs had made any inquiries of Mr. Gould. The defendant Brooksbank had left the country.

Taddy, Serjt., who appeared for Morland, stated that the defendants were admitted, under the sign manual of his Majesty, joint agents of the Royal Veteran Battalion, and that the transaction was a private transaction of Brooksbank's, totally unconnected with the agency matters, as appeared by the letters "S. A.," which were beside the acceptance, and denoted that the acceptance was for the separate account of Mr. Brooksbank.

The learned Serjeant contended that it was the duty of the plaintiffs to have made inquiries of Mr. Gould, of whom they might have learned the nature of the *transaction. He cited the case of Williams v. Thomas and others. (a)

Gould was then called as a witness for the defence; he stated, that the defendants had no other joint business than that of the Royal Veteran Battalion; that they kept no account anywhere but at Hammersley's; that he accepted the bill by the direction of Brooksbank, without any authority from Morland; that he did not enter it in the books of the Royal Veteran Battalion, nor did he tell Morland of it before it was due; that it was accepted for the separate advantage of Mr. Brooksbank; and that, if inquiry had been made of him, he should have told the person inquiring, that it was not accepted for the account of the Royal Veteran Battalion. The witness added, that the letters "S. A." were his private mark, and meant separate account.

Wilde, Serjt., objected to all this evidence as irrelevant.

TINDAL, C. J. Unless it is shown that there was fraud, and that there were circumstances from which the present plaintiffs might have discovered, if they would, what was the nature of the transaction, it is no answer to this action.

(a) 6 Esp. 18. That case decides, that when three persons undertake to accept bills for a particular concern, and the drawer draw bills on account of one of them only, and not for the particular concern, and he accepts in the name of the three, such bill cannot be recovered by the *pro* holder, who received it from the drawer, against the other two.

It would be a very good answer against any person who had taken the bill with a knowledge of these circumstances, but it is no answer to this action, unless it is shown that these plaintiffs were cognisant of them.

A witness was then called for the purpose of showing that the drawer of the *289] bill was in England at the time *when it was drawn, although it purported, on the face of it, to have been drawn at Guernsey; but on being asked the question, he denied that it was so; and there being no further evidence, the plaintiffs had a verdict.

Wilde, Serjt., and *Brodrick*, for the plaintiffs.

Taddy, Serjt., and *Jardine*, for the defendant Morland.

R. Gurney, for the defendant Brooksbank.

[Attorneys—*Wilde & Co.*, and *Langdon & Co.*, and *Gatty & Co.*]

DALTON v. IRVIN. April 24.

Where a broker is employed by a ship owner to procure a charter-party, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration, nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, and have been incurred in consequence of the ship owners having urged him to extraordinary expedition in the matter. And *semble*, that where the negotiation is not carried into effect, but there is no fault in the broker, he is not entitled to anything, unless the charter-party is actually signed.

ASSUMPSIT for commission, &c., with counts for work and labour, money paid, &c.

The plaintiff was a broker, and the defendant a ship owner, who had employed him to obtain a charter-party for one of his vessels to the island of Jamaica. A memorandum was entered into for the chartering of the ship by a Mr. Williamson; by which it was stipulated, that the cargo of log-wood, &c., was to be carried to Jamaica, and the ship was to be at liberty to put into Morant Bay, and the usual places adjacent. When the charter-party was drawn up, it appeared that the plaintiff had inserted one guinea *per* ton as the rate of freight for the log-wood, and had named Plainain Garden River Bay, as one of the places at which the vessel might put in, as well as Morant Bay. Upon this, the defendant objected to signing the charter-party, and told the plaintiff that the freight of this log-wood ought to have been five guineas, and unless it was *290] altered to that sum he would be off the bargain. *The plaintiff said, five guineas was an unusual sum. The defendant required him to go to the freighter and get it altered, repeating, that if he did not he would be off the bargain; and he gave him half an hour to go in, saying to him—"Why should you object, *you will have your commission whether or no.*" The matter was not arranged, and the bargain eventually went off. The plaintiff had had bills printed, and incurred some other expenses. It appeared that the defendant had desired him to use all expedition in the matter.

Wilde, Serjt., for the defendant, contended, that the plaintiff must be nonsuited. The case of *Read v. Rann*, (a) is an authority to show that the broker is not entitled to anything, even though the bargain goes off through the unreasonable conduct of the ship owner. He is either entitled to his commission or nothing.

Taddy, Serjt. The counsel in *Read v. Rann* thought it for his client's interest, to rest his claim wholly on the right to commission; and that makes the difference between that case and the present. Mr. Justice J. Parke left it to

(a) Not yet reported, *vide post*. We are informed that there were two trials of this case. On the first, Mr. Justice J. Parke left it to the Jury to say, whether the broker had or had not been in fault. On the second, Lord Tenterden, C. J., nonsuited the plaintiff, on the ground that he had not proved any custom to entitle him to any compensation under the circumstances of the case. This will account for the different statements of the case made by the two learned Serjeants, *at supra*.

the Jury to say, whether the broker was not in fault in not inserting a particular clause in the charter-party. He says: "You will still have to say whether the broker was not responsible," &c.

TINDAL, C. J. If it went off through the fault of the broker, there would be no doubt that he could not recover anything.

*Taddy, Serjt. Will it be contended that we are not to be paid the sum for printing the bills and making the endorsement on the register? [*291 And the argument must go that length, or it goes no length at all.

TINDAL, C. J. He might recover for the money laid out, though not for his remuneration.

Taddy, Serjt. If there be a custom, it applies to cases where *the service is complete*; but if the service is incomplete, the party is entitled to reasonable remuneration for what he has done. I have not put my case upon a custom. There is no evidence of custom here. In the case cited, the question was not whether the party was entitled to remuneration, but whether he was entitled to commission.

Wilde, Serjt. That is not so: witnesses were called there, to show what was a reasonable custom. With respect to the further claim in this case for the expenses of printing bills, &c., I submit that the plaintiff is not entitled to them, as they are incurred to save the broker trouble, and prevent the necessity of his running about. In *Read v. Rann*, there was no claim for payments made. The broker, in that case, did not act so imprudently as this plaintiff has done. It is an attempt to take an unfair advantage of what has occurred.

On the part of the defendant, it was proved, that Plaintain Garden River Bay, was twenty-nine miles distant from Morant Bay, by water; and that, on account of the general state of the wind, it often took a vessel ten or twelve days in the summer months, to go from one to the other. Some brokers were also called as witnesses, who stated, that, according to their experience, if a broker employed to procure a charter-party did not procure it, he was not [*292 *entitled to anything, even for expenses. And one of them mentioned an instance in which bills had been printed, but were not charged for, on account of the negotiation having gone off.

Taddy, Serjt., in reply. The question of remuneration is not so much a question of law as of fact, and the point will be, whether the parties contracted, on the understanding that the plaintiff was not to be paid anything if the charter-party was not made. It is clear that the defendant did not understand it so; for he said to the plaintiff, "Why should you object to go to the freighter, it can make no difference to you, because you are entitled to your commission." This, I contend, means, you will be entitled to remuneration, whether the charter-party is executed or not. As to the expenses, the defendant's witness says, that he only knew one instance where bills had been printed, and in that instance the broker was not paid for them. This proves nothing, because it might not be thought worth while to insist upon it. In *Read v. Rann*, it was admitted, that the broker asked for commission; but here I do not ask for it. I only ask for a fair remuneration.

TINDAL, C. J. (in summing up), said—This action is brought by the plaintiff, to recover a sum of money, as a remuneration for work and labour done, and for money paid for the use and benefit of the defendant. As to the first part of the claim, the whole course of the evidence shows, that the plaintiff did act in endeavouring to procure a charter-party for the defendant's vessel. But it was not procured; commission, therefore, is quite out of the question, as the subject-matter out of which it was to arise, viz. freight, was never obtained. Two brokers, called on the part of the defendant, say, that as far as their experience goes, they are not aware of any instance in which a broker, who does not obtain a charter-party, is entitled to *anything, even for expenses. And there [*293 is no evidence on that point on the part of the plaintiff. The question which I shall leave to you is, whether there was any particular contract in this particular case, to take it out of the ordinary rule upon the subject. I can find

nothing of the kind, except one expression of the defendant's to the plaintiff, as to his being entitled to his commission. Unless you can suppose that the defendant agreed to bind himself to pay something, at all events; unless you think that by this loose conversation, he meant to take this case out of ordinary rule which prevails on these occasions, it does not appear to me that the plaintiff will be entitled to anything. In ordinary cases, if the charter-party is not carried into effect, the broker would not be entitled to recover for the incidental expenses, for they would follow the same course as the claim for the work and labour, which in such case has become altogether useless to the principal.

The question, therefore, as to these expenses will be, whether the defendant, by desiring the plaintiff to use all expedition, induced him to lay out the money before the usual time; because then the expense will not have been incurred by the plaintiff's imprudent conduct, but by the act of the defendant himself. If the defendant was right in rescinding the contract, that will be an answer also to the claim of expenses. The question, therefore, will be, whether, when the charter-party was presented to him for signature, he had a justifiable cause for refusing to sign it, saying, this is not the contract I was entitled to expect; for if he had, then the plaintiff cannot recover even for the expenses. The defendant says, that the clause in the charter-party about the log-wood was not justified by the memorandum which had been previously entered into. It seems that the defendant said, that the freight of log-wood, which was inserted in the charter-party at one guinea, should have been at five guineas. The plaintiff said, that was unusual; and the defendant wished him to go to the freighter *294] and get it altered. The *plaintiff objected; and at last the defendant said, that he would be off the bargain if he did not, and gave him half an hour to go in, saying—"Why should you object? You will have your commission whether or no." It does not appear that there was anything about the amount of the freight for log-wood in the original memorandum. The question is, whether there was a material difference between the charter-party as extended, and the memorandum as drawn up at first, because, if there was, the defendant had a right to object, and the plaintiff will not be entitled to the expenses.

His Lordship then shortly adverted to the point with respect to the "usual places adjacent" to Morant Bay, and left the case to the Jury, who found a—
Verdict for the defendant.

Taddy, Serjt., and Hutchinson, for the plaintiff.

Wilde, Serjt., and R. V. Richards, for the defendant.

[Attorneys—*Hutchinson, and Oliverson & Co.*]

See the cases of *Haines v. Busk*, 5 Taunt. 521; *Money Penny v. Hartland*, 1 C. & P. 352; and *Hamond v. Holiday*, 1b. 384. The case of *Haines v. Busk* decides, that it is no answer to an action by a broker for commission for procuring freight, that the charter-party procured was such, that if the charterer failed to obtain certain licenses, the voyage would be illegal. The case of *Money Penny v. Hartland* decides, that if a surveyor makes an estimate, which turns out to be incorrect, to a considerable amount, through his omitting to examine the ground for the foundation of the work, he is not entitled to recover anything for his plans, specifications, or estimates made for that work. The case of *Hamond v. Holiday*, decides, that if the duties of a sworn broker are executed in such a manner, that no benefit results from them, he is not entitled to recover either his commission, or even a compensation for his trouble. In the case of *Broad v. Thomas*, tried at Guildhall, July 9th, 1830, the question arose as to whether there was any custom by which a broker in London is entitled to recover commission, if the authority, signed by the captain, is signed by the merchant, but no charter-party is executed, in consequence of the captain saying, he could not go the voyage. Brokers were called as witnesses on both sides, and the Jury found for the defendant.

*295]

*MARYON v. CARTER. April 19.

Where it was part of a condition precedent to the claim of a sum of 80*l.*, in addition to the purchase-money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April; it was held that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim.

THE declaration was on a covenant entered into by the defendant with the plaintiff, a builder, by which the defendant undertook to purchase one of a row of houses, which the plaintiff was then building, for a certain specified price; and also covenanted to pay a further sum of 80*l.*, provided the adjoining houses should be completed, i. e., roofed, sashed, paved in front, inclosed with iron railings in front, and occupied by tenants, for terms not less than yearly tenancies, by the 21st day of April, 1829.

The action was brought to recover this sum of 80*l.*, and the declaration averred the performance of the condition precedent. The defendant, denied in separate pleas, the execution of the various parts of the condition; and averred in the last plea, that the houses were not occupied by *bonâ fide* tenants, but by poor persons, whose occupations gave no additional value to the purchased house. On the first four pleas issue was joined; and to the fifth, there was a demurrer, and a joinder in demurrer.

A witness was called on the part of the plaintiff, who stated, that the houses adjoining the one purchased by the defendant were all erected and covered in by the 21st of April; and that the road was made, but the foot pavement was not all laid down before the 25th of April. He added, that the reason why it was not all laid down by the 21st was, that the weather was so bad, the men were not able to work.

Upon this it was objected on the part of the defendant, that the plaintiff could not recover the 80*l.*, as that part of the condition precedent had not been complied with, which required the pavement in front of all the houses in the same line with the defendant's, to be laid down by the 21st of April, [*296 as well as the houses themselves to be covered in, &c

Wilde, Serjt., for the plaintiff, replied, that the replication was framed with reference to a supposition, that if the plaintiff was prevented from executing the condition by acts over which he had no control, it would amount to a dispensation: not adverting to the distinction between duties cast upon a party by operation of law, and those which arise from his own express stipulation.

TINDAL, C. J. The plea is, that the plaintiff did not nor would pave the street before the houses, by the 21st of April. The plaintiff, by his replication, contends that he did. I am of opinion that you cannot get on after this evidence. I think that the plaintiff must be called— Nonsuit.

Wilde, Serjt., and R. V. Richards, for the plaintiff.

E. Lawes, Serjt., and Wyborn, for the defendant.

[Attorneys—Pasmore, and Carter.]

Where anything is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done. *Campbell v. Jones*, 6 T. R. 571. If one party covenants to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant. *Bone v. Eyre*, 2 W. Black. 1312.

In the case of *Paradine v. Jane*, Aleyn, 26, which was an action of debt for rent upon a lease, the defendant pleaded, that a certain German Prince, by name Prince Rupert, an alien born, enemy to the King, had invaded the realm with a hostile army, and with that force had expelled the defendant from the premises. To this plea the defendant demurred, and the Court held the plea to be bad; "and this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, as, in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Now, rent is a duty created by the parties upon the reservation; and had there been a covenant to pay it, there had been no question but that the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation then being a covenant in law, and whereupon an action of covenant hath been maintained (as Rolle said), it is all one as if there had been an actual covenant." See *Doe v. Kneller*, ante, p. 3.

SARCH v. BLACKBURN. Feb. 24.

A person cannot recover damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action of trespass; and if he had such cause, the circumstance of there being a notice on a board in large letters, warning persons to beware of the dog, will not be an answer to an action by him for the injury, if it appear that he was not able to read.

If no suspicion be thrown upon the plaintiff by the defendant, in such a case it may be taken that he had such cause, provided the dog is put in a place forming part of one entrance to the house of the defendant, although there may be other entrances of a more public description, by which the plaintiff might have proceeded.

ACTION for an injury done to the plaintiff's leg by the bite of a dog kept by the defendant.

The plaintiff was a watchman employed in the neighbourhood of Old Ford, where the defendant carried on the business of a milkman, and his sons that of a cow-keeper. The dog was in a yard near a piggery, a chicken-house, and a cow-shed, and was attached to his kennel by a chain about four yards in length; over the kennel, nailed against the pailings, was a board, on which was painted in letters three inches in length—"Beware of the dog." The plaintiff was unable to read. There were three entrances to the house and premises in question, one of them more public than the other two, which did not lead past where the dog was; but it appeared that a person going by either of the more private ways might pass the dog in proceeding to the house.

*A witness named Folger, who was called on the part of the plaintiff, *298] stated, that he had been bitten by the dog in question about three years before, and the defendant upon that occasion applied some brandy to his leg. The witness, however, said, on his cross-examination, that the place where the dog was put, was in a private way for the use of the family, and through which he thought he had no business to go; but he had been there before with one of the defendant's sons, and he did not think that the dog would bite him. He added, that robberies were frequently committed in the neighbourhood.

Taddy, Serjt., for the defendant, submitted that there was no case to go to the Jury.

TINDAL, C. J. I think the evidence given by the witness Folger, that the dog had bitten him before, is something to go to the Jury. It launches the case. The question I propose to leave to the Jury is, whether there was any negligence in the plaintiff in going where the dog was. If it was a way in which he might reasonably go to the house for a lawful purpose, in short, if it might have been pleaded in answer to an action of trespass, then this action is maintainable, otherwise not.

Taddy, Serjt. In Sir W. Clayton's case, 1 J. B. Moore, 203, it is very much discussed, whether spring guns might not be set up in grounds *without notice*; but it was not disputed, that, if notice be given, a man may defend his property by the erection of spring guns.

TINDAL, C. J. It is a very nice question; I will take a note of your objection.

Taddy, Serjt., then addressed the Jury for the defendant. He contended, that, as there was a piggery and a poultry-yard near the place where the dog *299] was, it must *be considered that the dog was necessary to protect the defendant from thieves; and also, that the plaintiff had no right to go to the house through that way, there being other and more public entrances, and this private entrance being for the use of the family only. And with respect to the question as to whether the defendant had been guilty of negligence, he submitted that he clearly had not. If he is to have any dog at all, he must have one sharp enough to be of use. The plaintiff's inability to read is no fault of the defendant; the notice board, with letters three inches in length, was the only way in which he could give notice. Some learned persons have thought that spring guns may be set up without any notice, on the ground that a party has a right to protect himself against persons who have no business on his pre-

mises. I submit that the defendant has done all that he could, and has only used the dog for the defence of his premises, and is therefore not liable in this action.

Wilde, Serjt., referred to the case of *Bird v. Holbrook*. (a)

TINDAL, C. J. The question will turn upon whether there was a justifiable right to be on the spot.

Taddy, Serjt., referred to the case of *Brock v. Copeland*, (b) and the cases in *Roscoe on Evidence*, p. 219.

* *Wilde, Serjt.*, called the attention of his Lordship to the form of the [*300 second count in the declaration.

TINDAL, C. J. I think it will all come round to this:—You cannot alter the law by the mode of framing the declaration; you must show that the dog was accustomed to bite, and that the defendant knew it, before you can throw upon him the responsibility of keeping it from doing so. If a man puts a dog in a garden, walled all round, and a wrong-doer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that which was brought upon him by his own act. The difficulty is in saying, whether, in the particular place, the means adopted by the defendant were sufficient. We must see, first, whether the plaintiff had a justifiable and reasonable cause for being on the spot; whether he was there without any notice, having such cause as would justify him if he had an action brought against him as a trespasser, for being on the defendant's premises. It seems that there are three different entrances to the premises; one of them more public than the rest, having a spring gate; another, called the middle entrance, across a field; the third, an entrance across the cow-yard, and through a private gate and another yard to the house. The plaintiff must have gone through one of the last two. Undoubtedly, a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near to the door of his house, that any person coming to ask for money, or on other business, might be bitten. And so with respect to a foot-path, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it. As to the notice, it does not appear to me that a painted notice is sufficient, unless the party is in such a *situation in life as to be able to [*301 avail himself of it. It does not appear to me that this notice is sufficient, so as to bar the action, if the plaintiff had any right at all to be on the spot, for it seems that he was not able to read. Then, was there anything in the appearance of the dog which would lead the plaintiff to suppose, that the dog would bite him. It seems that the injury happened in the middle of the day, in the month of July; and that the plaintiff was a person employed as a watchman in the neighbourhood; and as no suspicion has been thrown upon him by the other side, you may presume that he was going to the house for a lawful purpose. The only way in which I can leave the question (which I admit is one of considerable nicety), for your consideration, is to leave it to you to say on which side was the negligence upon this occasion. If there was negligence on the part of the plaintiff, he cannot recover for an injury which he has in part brought upon himself; but if there was no negligence on his part, and there was negligence on the part of the defendant, then the plaintiff will be entitled to your verdict. The Jury found for the plaintiff, damages, 70*l*.

Wilde, Serjt., and *Platt*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attorneys—*West & Morris*, and *Dalton*.]

(a) 1 Moore & Payne, 607. The defendant set a spring gun in his garden (which was at some distance from his dwelling), of which fact he gave no notice. The plaintiff entered his garden in pursuit of a stray fowl, and, coming in contact with one of the wires, was wounded by the discharge of the gun:—Held, that he was entitled to recover damages for the injury, in an action on the case.

(b) 1 Esp. N. P. C. 203. In an action on the case for keeping a dog used to bite, if the dog was kept on the defendant's premises, and the injury received in consequence of the plaintiff imprudently going on them, the action cannot be maintained.

IN the ensuing Easter Term, a rule nisi for setting aside the verdict was obtained, which was called on for argument in the following Term; when the cause was stated to have been settled, and nothing further took place on the subject.

Vide Blackman v. Simmons, 3 C. & P. 136.

*302]

*WARD and Another v. SMITH. *April 21.*

Though a letter, written confidentially by the correspondents of a foreign mercantile house, contain very strong expressions concerning third persons engaged in mercantile transactions, imputing to such persons "notoriety for everything but fair dealing, and a strict adherence to their engagements:" yet, *semble*, that those expressions will not, *per se*, take away the privilege which attaches to such a communication, and make the letter a libel.

LIBEL. The declaration stated that the plaintiffs had jointly contracted with the commissioners of the navy to import and deliver at the Dock Yard certain quantities of African timber; and that the plaintiffs were about, by means of one Barber, to purchase of Messrs. Weston & Clouston timber to fulfil their contract; and that the defendant intending, &c., published of and concerning the plaintiffs, as such joint contractors, and of and concerning the said contract with the said commissioners, and of and concerning the said Barber, and of and concerning himself, the said defendant, a certain libel, in the form of a letter, addressed to the said Messrs. Weston & Clouston, &c. &c. Plea—Not guilty.

The libel was dated the 17th of September, 1828. It was written by the defendant, in the name of Foster & Smith, the firm of which he was a partner; it was not directed to any one, but a copy of a letter, referred to in the commencement of it, and annexed to it, was addressed to Messrs. Weston & Clouston, who were merchants at Sierra Leone, and for whom the defendant's house acted as agents in London. It was as follows:—

"The annexed is a copy of our last, since which we have yours, &c. The navy board have come to the determination, which they state to be unalterable, that the timber shall be measured strictly according to the drawings in the contract, making perfectly square timber. We, of course, have nothing to do with it now. The contractors, however, are determined to go on, and for that purpose have appointed Mr. Barber their agent, to purchase the timber necessary to fulfil it, authorizing him, we presume by power of attorney or otherwise, to draw bills on them for the amount of the cargo. We confess we are at a loss what

*303] advice to give you under these circumstances, *for the *contractors are notorious for everything but fair dealing and a strict adherence to their engagements*; and should any difference arise between them and the board as to the measurement of the timber, they would, with little ceremony, turn round and set Mr. Barber and his bills at defiance. However, the better plan probably will be, to act with Mr. May, and not to make any contract which will extend beyond the present season, obtaining Mr. Barber's directions as to measurement, although that would, we suspect, have little weight with them," &c. &c.

The letter of the 27th August, speaking of the contract with the navy board, said,

"In place of our getting it as we so confidently expected, parties, of the name of Ward & Somes, have got it on terms only one shilling a load under our tender. We suppose that they got at the terms of our tender under some secret influence with the navy board."

It also contained a complaint that Barber had offered his services to Messrs. Ward & Somes, instead of to them, Messrs. Foster & Smith.

The witness who proved the handwriting of the defendant, stated, on his cross-examination, that he was not aware that Messrs. Weston & Clouston had any other London correspondence than Messrs. Foster & Smith; that Messrs.

Weston & Clouston were indebted to Foster and to Smith individually: and that Messrs. Foster & Smith were in the habit of informing them of the state of the market with respect to timber, &c.

The contract of the plaintiffs with the navy board was, to supply thirty-six thousand loads of timber, according to certain models and drawings referred to in it, which required the timber to be "die square;" but it being found impossible to bring it home in that state from Sierra Leone, in consequence of the natives cutting it with an adze, the commissioners allowed it to be brought home in the usual *shape, on the contractors consenting to a reduction in the price. There was an agreement between the plaintiffs and Messrs. Foster & Smith, for the latter to share in the contract, which was at first repudiated on account of the commissioners refusing to alter the terms of the contract as to the shape of the timber, but confirmed afterwards on their consenting to do so. [*304]

The libel, and the copy of the letter annexed, were received in London, from Mr. Barber at Sierra Leone, by the agent of the plaintiffs, in a packet with letters on other subjects, on the 21st of January, 1829.

A Mr. Houghton, a ship owner, was called as a witness, and stated that he had a conversation about the 24th of September, with the defendant, in which he applied for a freight of timber for a ship, of which he, the witness, and Clouston, were owners. The defendant asked, who was to be the purchaser; and the witness replied, the contractors. The defendant said, very well; I have authority from Mr. Clouston to treat with you for a cargo for your ship. The conversation then turned upon the contract, and the defendant said, he doubted the ability of the contractors to go on unless the Government modified their contract; and he thought it would come into the market again. He expressed surprise on hearing that a house in London had sold them some timber. The witness told him, that he had authority from the plaintiffs to offer any mode of payment he pleased, either bills or cash. The defendant said, I dare say they are good enough, I dare say you think so: and he agreed to take their bills.

Taddy, Serjt., for the defendant. The allegation is not proved, that, at the time, &c., the plaintiffs, by means of one Barber, were about to purchase timber. There is no proof that Barber was the agent of the plaintiffs, employed by them to purchase. That part of the libel which speaks of it, only shows the understanding of the defendant on the subject. *Secondly*, there is no proof of *publication of the libel, by Smith, the defendant—the letter of the 17th of September is taken to be addressed to Weston & Clouston by fair inference, as the copy letter of the 27th of August appears to have been addressed to them. The copy letter being shown to have been in the defendant's office is no evidence of malice *individually* in Smith. The rule as to what is done by clerks in mercantile transactions does not extend to that which is to show *individual* malice; the malice may be that of Mr. Foster or the clerk, and not that of the defendant. I submit that there is not proof of publication, because it is not shown that the letter ever reached Messrs. Weston & Clouston. There was a case of libel, in which it appeared that a defendant wrote a letter, and delivered it unsealed to a messenger, who did not read it, but delivered it as it was to the plaintiff, and this was held not to be a publication. (a) The evidence of Houghton negatives the existence of malice. The objection made by the defendant in the conversation with him, was not to the contractors, but to the terms of the contract. The defendant's saying he doubted the ability of the plaintiffs, and yet agreeing to take their bills, shows the *bona fides* of his conduct, and negatives the existence of malice. The defendant only wanted to put the correspondents of his house, Messrs. Weston & Clouston, on their guard. The letter complained of as a libel begins in the ordinary way as a letter of business, speaking of various matters, and then refers to the determination of the navy board. The defendant's house being the sole correspondents in Lon

don of the house at Sierra Leone, and the defendant being a creditor of that house, it was his duty to guard them against making improvident contracts.

TINDAL, C. J., in his summing up, said—The first question will be whether there is evidence that the libel was published by the defendant; and the next, *306] whether, *under all the circumstances, it comes under the class of cases relating to privileged communications; and whether, though *prima facie* it appears to come within that class of cases, there is evidence to satisfy you of the existence of malice in the defendant towards the plaintiffs. The letter in question is in the defendant's handwriting, but is not addressed to any person; but a copy of a former letter, made by a clerk and annexed to it, was addressed to Messrs. Weston & Clouston. If the letter in question was, in point of fact, addressed to Weston & Clouston, it would be a sufficient publication by the defendant. The general foundation of an action of slander is, that the defendant was actuated by a malicious motive; but if a letter is written confidentially, the law will not imply malice, but its existence must be proved by the party complaining. The question will be, whether, on the whole of the evidence, this letter of the defendant's, in the name of his firm, was an honest, fair confidential communication, made *ad consulendum* Messrs. Weston & Clouston, to put them on their guard with reference to certain circumstances which had taken place in England; or whether it was written with a malicious motive, to injure the plaintiffs. If you think it proceeded from a sinister motive, and was not that fair confidential communication which I have alluded to, then the plaintiffs will be entitled to your verdict. It appears that there was an agreement for the defendant's house to share in the contract made by the plaintiffs with the navy board, which was afterwards renounced, and subsequently confirmed, because the navy board altered their determination as to the shape of the timber. His Lordship read the libel, and observed—It is not every little breach a man may make of the laws of civility or propriety, which, if he is writing in a confidential style, will take away the privilege. And if this letter had stood alone in the case, I think the whole would have been within the privilege. But it is connected with the copy letter of the 27th August. That letter, referring *307] to the contract with the navy board, says, *"In place of our getting it, as we so confidently expected, parties of the name of Ward & Somes have got it, on terms only one shilling a load under our tender. We suppose they got at the terms of our tender under some secret influence with the navy board." It then complains that Barber had offered his services to the plaintiffs instead of to them. The question is, whether you think the letter was written fairly and honestly, to put Messrs. Weston & Clouston on their guard. If you do, you will find your verdict for the defendant, because, in such case, it will be privileged. But if you think that the plaintiffs have given evidence to draw it out of that privilege, and show the existence of malice in the defendant, then you must give them such reasonable damages as you think they are jointly entitled to for the injury they have sustained. Verdict for the defendant.

Wilde, Serjt., and R. V. Richards, for the plaintiffs.

Taddy, Serjt., and Wightman, for the defendant.

[Attorneys—Bazendale & Co., and Davis & R.]

A NEW trial has been obtained in this case; but the Court made the rule for it absolute, without giving any opinion upon the law

PROMOTION.

IN Hilary Term, 1830, John Bernard Bosanquet, Esq., one of his Majesty's Serjeants learned in the law, was appointed one of the Judges of the Court of Common Pleas, *vice* Sir James Burrough, Knt., resigned.

*COURT OF KING'S BENCH.

[*308]

FIRST SITTING AT WESTMINSTER IN EASTER TERM, 1830.

BEFORE LORD TENTERDEN, C. J.

GREEN v. BARTRAM. May 11.

A. went to the house of B. to demand a debt, which B. said he could not pay. Angry words passed, and B. told A. to leave his house, this A. refused to do unless he was paid. Upon this B. sent for a police officer, and had A. locked up in the watch-house:—Held, that if A. was making a disturbance, B. would have been justified in turning him out of his house, but that he was not justified in imprisoning him.

ACTION for false imprisonment, with a count for an assault. Pleas—*First*, General issue. *Second*, That the defendant was possessed of a dwelling-house, and that the plaintiff was making a great noise and disturbance therein; and that, because he would not depart when requested so to do, the defendant sent for an officer to take him into custody, &c. *Third* (as to the assault and battery only), that the plaintiff was making a great noise and disturbance in the defendant's house, and that he gently turned him out. Replication, *de injuria*.

It appeared that the plaintiff, on the 27th of September, 1828, went to the house of the defendant to demand a debt of 2*l.*, which the defendant said he could not pay; and that upon this some angry words passed, and the defendant several times desired the plaintiff to leave the house; this the plaintiff refused to do, and said he would not go without his money. Upon this the defendant gave the plaintiff in charge to a police officer, who took the plaintiff to the watch-house, where the defendant charged him with making "a riot and disturbance in his house," and the plaintiff was in consequence locked up in the watch-house till the following day.

Lord TENTERDEN, C. J. If the plaintiff was making a disturbance in the house of the defendant, he might have turned him out of his house, using no more force than was necessary; but he had no right to cause him to be [*309] imprisoned in the watch-house. In point of law, the plaintiff is entitled to a verdict.

Verdict for the plaintiff, damages, 5*l.*

Scarlett, A. G., and *Kelly*, for the plaintiff.

Platt, for the defendant.

[Attorneys—*Hubert*, and *Ivemy*.]

ADJOURNED SITTINGS IN LONDON, AFTER EASTER TERM, 1830.

IRVING v. KING, Gent., one, &c. June 16.

A. and B. were litigant parties in several actions, C. was the attorney of B.; and at a meeting to settle the actions, it was agreed between A. and B., in the presence of C., *inter alia*, that C. should give his promissory note at two months as a collateral security for the payment by B. to A. of a sum of 450*l.* And it was added that all the effects which A. had of B.'s should be delivered up to C. as B.'s attorney. C. signed the note at the meeting immediately after the signing of the agreement:—Held, in an action on the note by A. against C., that the delivery up of the effects was not a condition precedent to the right of A. to claim the money.

ASSUMPSIT on a promissory note for 450*l.*

The plaintiff had been private secretary to Lady Gresley, and the defendant was her attorney; and in consequence of some disagreement between Lady Gresley and the plaintiff, two actions were brought by her against him, and one action was brought by him against her, which actions had proceeded for some time, when a meeting took place for the purpose of settling them, and the following agreement was entered into:—

“Gresley v. Irving, in *detinue*.

“Same v. Same, in *assumpsit*.

“Irving v. Gresley.

“It is agreed that the two several actions first above mentioned be discharged, and the same shall be considered settled, each party paying their own costs.

“It is also agreed that the last above-mentioned action be settled in the following manner: Defendant to pay to plaintiff this day the sum of 200*l.* down, and to grant her **cognovit* for 450*l.*; the amount of which plaintiff agrees
*310] to accept of in full of the balance of debt, together with costs as between attorney and client, payable two months from this day; Mr. King, defendant's attorney, agreeing to give his promissory note at two months as a collateral security for payment of the said sum of 450*l.* *All the effects which plaintiff has in his hands belonging to the defendant to be delivered up to Mr. King as her attorney.* All matters in dispute between the parties to be considered settled as above, and all receipts and vouchers for payments by Dr. Irving, as the agent of Lady Gresley, to be given up to Mr. King as her attorney. Dated this 2d day of January, 1830.

(Witness) W. H. KING.

“M. E. GRESLEY.

“CHRIST. IRVING.”

The promissory note in question was signed at this meeting by Mr. King immediately after the signing of the agreement by Lady Gresley and the plaintiff.

Platt, for the defendant, contended, that under this agreement the delivery up of the effects of Lady Gresley by the plaintiff was a condition precedent to be performed by him, before he could be entitled to claim the money of her as a principal, or of the defendant as her surety on the promissory note.

Lord TENTERDEN, C. J. I am of opinion that it is not a condition precedent either in language or in fact. The parties do not treat it as such, for the note is given immediately after the agreement is signed. I think the plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Archbold, for the plaintiff.

Platt, for the defendant.

[Attorneys—Burn, and *In Person*.]

*311]

*SHARPE v. GYE. June 10.

Where, in an action by the payee against one of the makers of a joint and several promissory note, to which the defendant pleads his discharge under the Insolvent Debtors' Act; it appears that no notice of the defendant's intention to apply for his discharge was given to the plaintiff, but that the note was drawn by the other maker, and signed by the defendant for his accommodation; it will be for the Jury to say, whether the defendant knew to whom the note was made payable, for if he did, notice would be necessary, otherwise not.

ASSUMPSIT by the payee against one of the makers of a joint and several promissory note for fourteen pounds.

The defendant pleaded his discharge under the Insolvent Debtors' Act.

No notice had been given to the plaintiff of the defendant's intention to take the benefit of the act. The note was in the handwriting of Miller, the other maker of the note, and the defendant signed his name to it at Miller's request, for his accommodation. The defendant, in his schedule, mentioned his having

accepted, for the accommodation of Miller, several *bills of exchange*, on which the plaintiff had a claim against him to the amount of 18*l*.

It appeared that Miller was, at the time, a clerk in the office of the plaintiff, and that the defendant had said he did not give notice to Sharp, because he did not think it necessary, but that he did give it to Miller.

Curwood, for the plaintiff, contended, *first*, that notice to the plaintiff was necessary, as the note was payable to him. And *secondly*, that this claim was not included in the schedule, as that only mentioned bills of exchange.

Lord TENTERDEN, C. J., left it to the Jury to say, whether the defendant knew that the note was made payable to Sharp; for, if so, the notice should have been given to him; but, if they thought (inasmuch as the body of the note appeared to have been written by Miller, whom the defendant was accommodating) that he did not know it, then it would not be necessary that he should have given notice, and he would be entitled to the verdict. Verdict for the defendant.

Curwood, for the plaintiff.

The defendant in person.

[Attorneys—*Sharp*, and *In Person*.]

*FIRST SITTING AT WESTMINSTER IN TRIN. TERM, 1830. [*312

DOE on the demise of LAMBOURN v. PEDGRIPH. *June 21*.

A draft agreement had on the back of it the following memorandum—"We approve of this draft." And this was signed by the parties:—Held, that it did not require any stamp.

EJECTMENT to recover three houses at Whitechapel.

It appeared, that the defendant had applied to the agent of the lessor of the plaintiff, to become the tenant of these houses, and that, during the treaty, he asked to be let into possession. This was acceded to, and he took possession. It appeared that a draft of an agreement between the parties had been prepared, but that, in consequence of some disputes, no lease had ever been executed; and that, when asked to give up possession, the defendant said he should dispute the lessor of the plaintiff's title.

For the lessor of the plaintiff, the draft of agreement was offered in evidence. It had written on the back—"We approve of the within draft." And this memorandum was signed by the lessor of the plaintiff and by the defendant.

Campbell, for the defendant. I submit that this requires an agreement stamp. By the stamp act it is necessary for every agreement, or minute, or memorandum of any agreement, to bear a stamp, whether it be only evidence of a contract, or obligatory on the parties, as a written agreement. Now, this draft, though not of itself an agreement, is, beyond all question, to be considered as evidence of an agreement.

Lord TENTERDEN, C. J. I think not. It merely amounts to this, that it is evidence of something they intended to agree to. I think that the words—"We approve of the within draft," do not import an agreement. Indeed, if they did, there would never be any necessity for any other instrument.

Verdict for the plaintiff.

Gurney, and *Manning*, for the lessor of the plaintiff.

Campbell, for the defendant.

[Attorneys—*W. H. Whitehead*, and *G. T. Whiteley*.]

CASES
AT
NISI PRIUS.

COURT OF KING'S BENCH.

FURTHER ADJOURNED SITTINGS, IN LONDON, AFTER TRINITY
TERM, 1880.

BEFORE LORD TENTERDEN, C. J.

GIBSON and Others, Assignees of KING, a Bankrupt, v. OLDFIELD
and Others. *Oct. 20.*

If in an action by the assignees of a bankrupt, notice of disputing the trading, &c. has been given; and it appear that part of the amount claimed could not have been recovered by the bankrupt; the proceedings under the commission are not sufficient proof of the trading, &c., to entitle the assignees to go for their whole claim, and they will, on such evidence, be restricted to that part of their claim which the bankrupt could have recovered.

ASSUMPSIT. The declaration stated, that, in consideration that the bankrupt, before his bankruptcy, would consign goods to the defendants, they undertook to account within a reasonable time. It then went on to aver, that goods were consigned, but that the defendants had refused to account with the bankrupt before his bankruptcy, or with the assignees since. *Plea*—General issue.

It appeared that some of the goods had been consigned to the defendants very shortly before the bankruptcy.

Notice of disputing the trading, the petitioning creditor's debt, and act of bankruptcy had been given.

*314] *Lord TENTERDEN, C. J. Will not the proceedings be sufficient proof
of the trading, &c.

F. Pollock, for the defendants. As part of this claim could not have been recovered by the bankrupt, the proceedings are not sufficient proof. There was a case here in which your Lordship held, that, if there was no other proof of the petitioning creditor's debt, trading, and act of bankruptcy, than the proceedings, the assignee must elect to go for that part of his claim which the bankrupt could have recovered.

Lord TENTERDEN, C. J. I believe you are right. I think that is so.

Witnesses were called to prove the trading, &c., and after that the cause was
Referred.

Gurney, and *D. Pollock*, for the plaintiffs.

F. Pollock, for the defendants.

[Attorneys—*G. H. King*, and *Wadson*.]

(a) By sect. 90 of stat. 6 Geo. 4, c. 16 (the bankrupt act), it is enacted, "That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner or other person shall prove the matter so disputed, or the other party admit the

accepted, for the accommodation of Miller, several *bills of exchange*, on which the plaintiff had a claim against him to the amount of 18*l*.

It appeared that Miller was, at the time, a clerk in the office of the plaintiff, and that the defendant had said he did not give notice to Sharp, because he did not think it necessary, but that he did give it to Miller.

Curwood, for the plaintiff, contended, *first*, that notice to the plaintiff was necessary, as the note was payable to him. And *secondly*, that this claim was not included in the schedule, as that only mentioned bills of exchange.

Lord TENTERDEN, C. J., left it to the Jury to say, whether the defendant knew that the note was made payable to Sharp; for, if so, the notice should have been given to him; but, if they thought (inasmuch as the body of the note appeared to have been written by Miller, whom the defendant was accommodating) that he did not know it, then it would not be necessary that he should have given notice, and he would be entitled to the verdict. Verdict for the defendant.

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The defendant in person.

[Attorneys—*Sharp*, and *In Person*.]

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It appeared, that the defendant had applied to the agent of the lessor of the plaintiff, to become the tenant of these houses, and that, during the treaty, he asked to be let into possession. This was acceded to, and he took possession. It appeared that a draft of an agreement between the parties had been prepared, but that, in consequence of some disputes, no lease had ever been executed; and that, when asked to give up possession, the defendant said he should dispute the lessor of the plaintiff's title.

For the lessor of the plaintiff, the draft of agreement was offered in evidence. It had written on the back—"We approve of the within draft." And this memorandum was signed by the lessor of the plaintiff and by the defendant.

Campbell, for the defendant. I submit that this requires an agreement stamp. By the stamp act it is necessary for every agreement, or minute, or memorandum of any agreement, to bear a stamp, whether it be only evidence of a contract, or obligatory on the parties, as a written agreement. Now, this draft, though not of itself an agreement, is, beyond all question, to be considered as evidence of an agreement.

Lord TENTERDEN, C. J. I think not. It merely amounts to this, that it is evidence of something they intended to agree to. I think that the words—"We approve of the within draft," do not import an agreement. Indeed, if they did, there would never be any necessity for any other instrument.

Verdict for the plaintiff.

Gurney, and *Manning*, for the lessor of the plaintiff.

Campbell, for the defendant.

[Attorneys—*W. H. Whitehead*, and *G. T. Whiteley*.]

CASES
AT
NISI PRIUS.

COURT OF KING'S BENCH.

FURTHER ADJOURNED SITTINGS, IN LONDON, AFTER TRINITY TERM, 1830.

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ASSUMPSIT. The declaration stated, that, in consideration that the bankrupt, before his bankruptcy, would consign goods to the defendants, they undertook to account within a reasonable time. It then went on to aver, that goods were consigned, but that the defendants had refused to account with the bankrupt before his bankruptcy, or with the assignees since. Plea—General issue.

It appeared that some of the goods had been consigned to the defendants very shortly before the bankruptcy.

Notice of disputing the trading, the petitioning creditor's debt, and act of bankruptcy had been given.

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F. Pollock, for the defendants. As part of this claim could not have been recovered by the bankrupt, the proceedings are not sufficient proof. There was a case here in which your Lordship held, that, if there was no other proof of the petitioning creditor's debt, trading, and act of bankruptcy, than the proceedings, the assignee must elect to go for that part of his claim which the bankrupt could have recovered.

Lord TENTERDEN, C. J. I believe you are right. I think that is so.

Witnesses were called to prove the trading, &c., and after that the cause was Referred.

Gurney, and *D. Pollock*, for the plaintiffs.

F. Pollock, for the defendants.

[Attorneys—*G. H. King*, and *Wadeson*.]

(a) By sect. 90 of stat. 6 Geo. 4, c. 16 (the bankrupt act), it is enacted, "That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner or other person shall prove the matter so disputed, or the other party admit the

*Lord TENTERDEN, C. J. That act does not apply to the 4*l.*, money [*319 lent.

Follett. Under the stat. of Geo. 2, it has been held, that disbursements cannot be recovered, if the bill has not been duly delivered.

Lord TENTERDEN, C. J. Money lent on a distinct occasion may be recovered, although no bill has been delivered, but disbursements in the suit cannot. Only 4*l.* can be recovered. Verdict for the plaintiffs.—Damages 4*l.*

Kelly, for the plaintiffs.

Follett, for the defendant.

of under the general issue. It should be observed, that this statute only requires the delivery of a bill signed, but it need not be a month before action brought, as is required under the stat. 2 Geo. 2, c. 23. However, the defendant in this case could not avail himself of the stat. 2 Geo. 2, c. 23, because it is by the stat. 12 Geo. 2, c. 13, s. 6, enacted, that the stat. 2 Geo. 2, c. 23, shall not extend to "any bill of fees, charges, and disbursements due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court; but every such attorney, solicitor, or clerk in court may use such remedies for the recovery of his fees, charges, and disbursements against such other attorney or solicitor as he might have done before the making of the said act."

*SECOND SITTING AT WESTMINSTER IN MICHAELMAS [*320
TERM, 1830.

BEFORE MR. JUSTICE LITTEDALE.

TROUP, Assignee of POTTER, an Insolvent Debtor, v. BROOKS and Others.
Nov. 16.

A. being in insolvent circumstances, and wishing to compound with his creditors, had two actions brought against him. A. applied to B., an attorney, to defend them, which B. refused, unless he was paid 20*l.* in hand. The money was paid to B., who defended the actions, the costs being more than 20*l.*; after this A. took the benefit of the insolvent act.—Held, that the 20*l.* could not be recovered by the assignees from B., as it was not a voluntary payment.

ASSUMPSIT for money had and received to the use of the insolvent, and also to the use of the assignee.

The plaintiff was the assignee of the insolvent, and sought to recover two sums, of 12*l.* and 8*l.*, as voluntary payments made to the defendants.

Authenticated copies of the insolvent's petition, schedule, and assignment were put in. The petition was dated the 20th of February, 1830, and it appeared that the insolvent went into custody on the 18th of that month.

To show the payment of the two sums of money, Mr. Crowe, the defendant's managing clerk, was called; he stated, that, in the month of November, 1829, the insolvent wished to assign his property for the benefit of his creditors, and that a meeting of creditors was called for that purpose; and that, after this, two actions were brought against the insolvent, which he applied to the witness to defend for him, but that he (the witness) told the insolvent, he could not do so without money; and the insolvent paid him first 12*l.*, and afterwards 8*l.* more for the expenses of the defence of those two actions. The actions were defended, and the amount of these sums was not more than equal to the costs of the defences.

For the plaintiff, sect. 32 of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, was relied on.(a)

(a) By which it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust

*321] **Scarlett, A. G.*, applied to the learned Judge to nonsuit the plaintiff. LITTLEDALE, J. A voluntary payment is where a man, in contemplation of insolvency, goes and pays a debt; but here the attorney, who is to defend an action, says, he will not go on without money. To constitute a voluntary payment under this act, two circumstances must concur—it must be a payment with knowledge of the insolvency, and it must be made voluntarily; now, admitting the first, I think that the second fails, it was not made voluntarily, as the attorney would not go on without it.

Denman, for the plaintiff, wished the case to go to the Jury.

LITTLEDALE, J. (in summing up.) The money in this case was paid to Mr. Crowe; but, being paid to him as the clerk of the defendants, in the course of business, it is just the same as if paid to them. I think it is made out, that Mr. Porter was in insolvent circumstances, and that he knew that he was so, and then the only question is, whether the payment was voluntary.

Verdict for the defendants.

*322] **Denman*, and *Talfourd*, for the plaintiff.
Scarlett, A. G., and *Campbell*, for the defendants.
 [Attorneys—*Galsworthy*, and *Person*.]

for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

LEWIS v. MASON. Nov. 16.

A., an insolvent debtor, in his schedule, stated that he had given his acceptance to B., who was the drawer of a bill, but A. did not mention the name of the endorsee in his schedule:—Held, that if he did not know the bill to have been endorsed, this would be a bar to an action by the endorsee; but that if the insolvent had been told that the bill was in the hands of the endorsee, the insolvent would be still liable, although the Jury might think he had forgotten what he had been told, and that his attorney had made inquiries as to who held the bill, with a view of putting such holder's name into the insolvent's schedule.

ASSUMPSIT on a bill of exchange for 6*l.* 3*s.* 6*d.* drawn by a person named Bloor, on the defendant, and accepted by him, and endorsed by Bloor to the plaintiff. Plea—That the defendant was duly discharged from the several promises and undertakings in the declaration, under the Insolvent Debtors' Act. (a) Replication—That the defendant was not duly discharged from the several promises, &c. [in the words of the plea.]

On the part of the plaintiff, the handwriting of the defendant and of Mr. Bloor, was proved; and a witness stated, that he had called on the defendant for payment, before he went to prison, and told him that the plaintiff had the bill.

For the defence, an authenticated extract of the defendant's schedule, and an authenticated copy of the adjudication of the Insolvent Court, were put in. In the schedule, this bill was referred to in the following terms:—"James Lilley, Bloor, & Co. 9*l.*, for goods, on account of which I have given an acceptance, the exact date and particulars of which I am unable to state." The clerk of the defendant's attorney in the Insolvent Debtors' Court, stated, that he prepared the schedule, and that he made many inquiries for the purpose of ascertaining who held this bill, but that he could not get any information on the subject.

(a) For the forms of the plea and replication, see the case of *Northam v. Latouche*, *ante* p. 141; and see the case of *Nias v. Nicholson*, 2 C. & P. 121.

LITLEDAL, J. (in summing up.) In this case, the *original trans-
action was with Bloor, and if the defendant knew nothing to the contrary, [*323
he would do right to put Bloor's name in the schedule. Under the 46th sect.
of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, an insolvent is discharged from
all claims of persons not known to him at the time of the adjudication, who may
be endorsees or holders of any negotiable security set forth in the schedule.
This, therefore, will be a good discharge, if the defendant did not know, at the
time of making out his schedule, that the plaintiff was the holder of this bill.
If you believe the witness called for the plaintiff, he knew that the plaintiff was
the holder, and this is no discharge; but, by the evidence of the attorney's
clerk, it appears, that he made inquiries and could get no information as to who
was the holder of this bill. It might have been that the defendant forgot all
about it, and that would reconcile all the statements. But if that were so, that
is no excuse for the defendant, for if he once knew who was the holder, it was
his own fault if he forgot it. Verdict for the defendant.

Erle, for the plaintiff.

Theisiger, for the defendant.

[Attorneys—*Boyd*, and *Sutton*.]

Erle afterwards made an application to the Court to set aside the verdict, on
the ground of misdirection, and on affidavits, but the Court refused a rule.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER MI- [*324
CHAELMAS TERM, 1830.

BEFORE LORD TENTERDEN, C. J.

PAYNE v. JENKINS. Dec. 3.

A party may recover the amount of an I. O. U., on a count upon an account stated.

ASSUMPSIT for goods sold, with a count upon an account stated. Plea—
General issue.

This was an action on an I. O. U. for 6*l.* 10*s.*; and it was opened, that the
plaintiff being the owner of an Arabian mare, the defendant gave 25*l.* in cash,
and this I. O. U., as the price of one-half share in this animal.

A witness called for the plaintiff, stated, that the defendant admitted the I.
O. U. to be his, but said he had paid enough for the mare. In his cross-ex-
amination, this witness stated, that there was a written agreement between the
plaintiff and defendant for a partnership in this mare; and that this I. O. U.
was part of the price paid for the defendant's share; the mare, before that part-
nership, having been the sole property of the plaintiff.

The I. O. U., which was not stamped, was in the following form:—

"I. O. U. 6*l.* 10*s.* 0*d.*

WM. JENKINS."

Campbell, for the defendant. An I. O. U. is a mere acknowledgment; and,
as it appears that this I. O. U. was given for money to be paid under a written
agreement, that agreement ought to be produced. Another objection is, that
there is no special count in the declaration; and I submit that the I. O. U. is
not applicable to any of the common counts.

*Lord TENTERDEN, C. J. There is a count upon an account stated. [*325

Campbell. I submit that an I. O. U. alone will not support an account stated; more especially in this case, where it appears to be coupled with a written agreement.

Lord TENTERDEN, C. J. An I. O. U. has been admitted on the account stated a great many times. The written agreement has nothing to do with it. He gives this as the price of becoming a partner; he pays it for having the written agreement.

Verdict for the plaintiff—Damages 6*l.* 10*s.*

Thesiger, for the plaintiff.

Campbell, and *Steer*, for the defendant.

[Attorneys—*Walter*, and *G. H. Reynolds*.]

See the notes to the case of *Edis v. Bury*, 2 C. & P. 559. In the case of *Knowles v. Michel*, 13 East. 249, Lord Ellenborough said, that "if there were an acknowledgment by the defendant of a debt due upon any account, it was sufficient to enable the plaintiff to recover upon the count for an account stated;" and in the case of *Highmore v. Primrose*, 5 M. & S. 65, it was held, that proof of the acknowledgment of one item of debt, is good to support a count upon an account stated.

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**REX v. LAYCOCK.* Dec. 8.

Perjury was assigned on an answer in chancery to a bill before it was amended:—Held, that, to support the allegation respecting the bill, it was sufficient to put in the amended bill, and prove that the amendments were in the handwriting of a clerk in the Six Clerks' office, whose duty it would be to make them; but that it was not necessary to call the person who wrote the amendments.

INDICTMENT for perjury in an answer in Chancery.

The bill in Chancery had been amended, but the perjury was assigned on the answer to the bill as it originally stood before the amendments.

The bill was produced by a person from the Six Clerks' office. He stated, that it was an amended bill, but that it was the original record, which was filed in the Six Clerks' office in the first instance, but altered by the amendments. He further stated, that the amendments were made by altering the original record, and that these alterations were all made by a clerk in the Six Clerks' office, whose handwriting he knew, and that that person wrote the word "amendment" against each alteration.

None of these alterations at all related to the particular parts of the answer upon which the perjury was assigned.

Campbell, for the defendant. It is essential that it should be shown what the bill was before the alterations; and I submit that the production of this parchment, with the explanations given by the witness, is not enough; the person who made the amendments ought to be called.

Lord TENTERDEN, C. J. I am of opinion, that the amendments are sufficiently proved; and I also think them not material to this case.

The bill and answer were read, and evidence gone into to prove the assignments of perjury.

Verdict—Not guilty.

Denman, A. G., and *Tomlinson*, for the prosecution.

Campbell, *Adolphus*, and *Holt*, for the defendant.

[Attorneys—*G. Bolton*, and *R. Oldershaw*.]

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**JOHNSON v. DURANT* and Another. Dec. 22.

In an action of debt on an award, interest is recoverable on the sum awarded, from the time at which it was demanded.

An arbitrator cannot be compelled to give evidence in a cause as to matters that occurred before him during the arbitration. *Vide n. (a).*

DEBT on an award made in a reference under a Judge's order. Pleas—The general issue to some of the counts, and a set-off to others. The question which had been referred to the decision of the arbitrators was, whether the plaintiff was entitled to recover, as against the defendants, the sum of 246*l.* 3*s.* part of the proceeds of a bill of exchange, of 292*l.*; and whether the defendants were entitled to a set-off of the like sum of 264*l.* 3*s.* for a bale of silk.

The arbitrators awarded in favour of the plaintiff's claim and against the defendants' right of set-off.

A rule for setting aside the award was discharged by the Court of King's Bench.

The plea of set-off, in the present case, was in the same words, as that which had been pleaded in the cause which had been referred.

It was stated, that it appeared before the arbitrators, that the sum of 237*l.* and a fraction, was due for the bale of silk, but that they considered themselves confined to the consideration of the question, whether the precise sum of 246*l.* 3*s.* was due in respect of it, and did not consider themselves at liberty to decide as to any other sum.

Campbell, for the plaintiff, contended that the matter was now *res judicata*, and that the arbitrators could not be called to show under what impression they had decided. (a)

*Sir *J. Scarlett*, for the defendant, contended, that the Court of King's Bench had not decided conclusively on the subject, because the rule which [328] had been obtained, for setting aside the award, was discharged merely in consequence of the affidavits on which it was obtained having been answered by the opposite party who swore last. He admitted that the defendants could not set off that which the arbitrators had decided upon, and he allowed that the award was right as confined by the Judge's order. The matter referred to the arbitrators was, whether the defendants had a right to set off the like sum of 246*l.* 3*s.*, and not that or any other sum. The limitation was to a specific sum, and the arbitrators could not consider any other. They have only awarded that there was no right to set off the particular sum, and I say that they could not set off that sum. It appeared clearly, that the sum of 237*l.* and a fraction was due for the bale of silk, and the defendants are in a situation to prove that the silk was bought on their account, and that the amount originally agreed to be paid was altered by some arrangement between the parties. I submit that it is more fit for his Lordship to interpret than for the arbitrators themselves, as the question, whether the award is final or not, depends on whether they had authority to allow any other set-off.

Lord TENTERDEN, C. J. I am of opinion, that the arbitrators were limited to the particular sum; but I am quite satisfied that the order of reference would not have been in those terms unless it had been agreed between the parties that that was the precise sum in dispute. If there has been any mistake, I [329] am sorry for it, but we cannot try the question again. The verdict must be for the plaintiff, with interest from the time at which the money was demanded.

Sir *J. Scarlett* objected to the allowance of interest.

Campbell said, that it had been decided, that interest was recoverable in such a case.

Lord TENTERDEN, C. J. It is a liquidated sum, and I am of opinion, that interest ought to be allowed upon it.

Verdict for the plaintiff on the first count, and for the defendants on the others.

(a) As to whether an arbitrator can be compelled to give evidence in an action on an award of what was done before him, we have been favoured with the following note of the case of *Ellis v. Saltau*, which was tried in the Court of Common Pleas, at the Sittings after Trinity Term, in the year 1808, before Sir James Mansfield, C. J.—“In an action on an award, the defendant called the arbitrator to prove the ground on which he made his award, in order to show that he had exceeded the limits of the submission. Mansfield, C. J., told the witness that he need not be examined unless he chose it, thinking that an arbitrator was not to be afterwards worried as a witness, and he declined to be examined. On a motion afterwards made for a new trial and cause shown, no objection was made to this decision.”

Campbell, and *Talfourd*, for the plaintiff.

Sir *J. Scarlett*, *F. Pollock*, and *S. Martin*, for the defendants.

[Attorneys—*Bartlett & B.*, and *J. & W. James.*]

In the ensuing Hilary Term, a rule nisi for a new trial, on the question as to the right of set-off, was obtained, with, as we are informed, the assent of the Lord Chief Justice.

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*NICHOLLS *v.* DOWNES. Dec. 24.

Seem, that certified copies of the schedule, &c., under the Insolvent Debtors' Act, are only evidence for the insolvent, and for his creditors, because they are the only persons entitled by the act to claim them. To make the contents of a schedule evidence against an insolvent debtor, *seem*, that some evidence of identity is necessary, and it will not be sufficient that the schedule purports to be the schedule of a person of the name of the insolvent.

DEBT for money lent, &c. The plaintiff relied on a written paper, signed by the defendant, acknowledging that a sum of 151*l.* was due to the plaintiff.

Campbell, for the defendant, was stating to the Jury, that the plaintiff had been in prison, and made out a schedule under the Insolvent Debtors' Act, but had not inserted the present claim in the list of debts due to him.

Lord TENTERDEN, C. J. Is not that enough? Can a man be allowed to say, in a Court of justice, that money is due to him when he has not put it into his schedule?

F. Pollock, for the plaintiff. There was a case before Lord Ellenborough, in which the action was brought on a bill of exchange which the plaintiff had not inserted in his schedule, and his Lordship said, that a man was not to be cheated out of what was really due to him, because he had attempted to cheat his creditors.

Lord TENTERDEN, C. J. At all events, it is a very strong circumstance for the consideration of the Jury.

Campbell. The case mentioned by Mr. *Pollock*, must have proceeded on the ground of mistake. But, in this case there can be no mistake, the plaintiff must have known whether so large a sum as 151*l.* was due to him or not.

On the part of the defendant, a certified copy of the schedule, duly authenticated by the proper officer of the Insolvent Debtors' Court, was offered in evidence. It appeared that the plaintiff had not been discharged by any order of the Court, but had got out of custody by some arrangement with his creditors.

*331] *F. Pollock*, for the plaintiff, objected to the reception of the copy of the schedule, as it appeared that nothing had been done upon it. He also proposed that the defendant's examination should be taken out of Court, and said, that the plaintiff was willing to lose the verdict, if she would swear that the money was not owing.

Lord TENTERDEN, C. J. (after looking at the Act of Parliament. (a))—There may be some difficulty about the construction of the act; and I think, therefore, the better course will be, that Mr. *Pollock's* offer should be accepted, and the defendant's examination be taken out of Court. There is no doubt that certified copies are evidence in favour of the prisoner; because, by the Act, he is entitled to have them; and also in favour of creditors, because they too are entitled to have them. But I doubt if they are evidence for other persons. There is no doubt, that, if the original schedule were here, and the plaintiff's handwriting were proved, it would be evidence against him.

A witness was then called, who stated, that, in a conversation which he had with the plaintiff, about obtaining his discharge, he, the plaintiff, had referred

who held them as an agent, was called. He had been served with a *subpoena duces tecum*; but, on his appearing—

Wilde, Serjt., for the plaintiff, proposed to call on him to put in the papers without being sworn as a witness in the cause.

Ludlow, and *Bompas*, Serjts., objected to this course of proceeding; they submitted that a person could not be called to produce papers, without being sworn as a witness.

Wilde, Serjt., and *Follett*, in answer to the objection.—Two cases have been decided on the subject: one was a case in which a justice of the peace was called to produce an information taken before him; and it was held, that the parties calling for the paper were not compellable to examine the justice as a witness, but might prove the information in any other way. In the other case, Mr. Justice Gaselee allowed an attorney to be called, to produce certain papers, without compelling the party who called him to have him sworn as a witness.

**Ludlow*, and *Bompas*, Serjts., in reply, contended, that the course pursued by the party calling such a person, assumed that he was in possession of the papers required, which assumption they had no right to make, but could only ascertain the fact by putting the question to him; and the putting of that question would clearly render him a witness, and entitle the other side to cross-examine. [336]

TINDAL, C. J. If the question were now submitted to me as a new question, I should know how to decide it; but, I am told, that there are cases on the subject; and though the report of those cases has not been quoted, yet I have no doubt that they have been correctly stated by the counsel; and, under these circumstances, I shall prefer following the practice of others, to laying down any new rule of practice myself.

The papers were then allowed to be put in without the party who produced them being sworn. Verdict for the plaintiff.

Wilde, Serjt., and *Follett*, for the plaintiff.

Ludlow, and *Bompas*, Serjts., for the defendant.

[Attorneys—*Henderson*, and *Battye & Co.*]

See the cases of *Simpson v. Smith*, *Roscoe on Evidence*, p. 75; *Rex v. Brooke*, 2 *Starkie*. N. P. C. 472; and *Phillips v. Eamer*, 1 *Esp.* N. P. C. 355.

*ADJOURNED SITTINGS AT WESTMINSTER AFTER TRINITY TERM, 1830. [337]

PROCTOR v. HARRIS. July 8.

A publican, who has a flap-door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it.

ACTION for an injury sustained by the plaintiff in consequence of his having fallen into a space occasioned by the opening of a trap door in the foot pavement, in front of the house of the defendant, who was a publican, and, at the time of the injury, being lamp-light in the evening, had just had a butt of beer let down by the aperture in question into his cellar.

TINDAL, C. J., in summing up, said—The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk

along these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them; but, on the other hand, it must be understood, that as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into the danger. If there had been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the *338] nature of a nuisance, *used in the manner it was, and whether, looking to all the circumstances, the plaintiff fell in, owing to the negligence and carelessness of the defendant, in not sufficiently protecting the place at this hour, being after dark. If you think so, you will find for the plaintiff. But, if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant.

Verdict for the plaintiff—Damages 5*l*.

Bompas, Serjt., and *Hutchinson*, for the plaintiff.

Spankie, Serjt., and *Follett*, for the defendant.

[Attorneys—*D. Davies*, and *Townsend*.]

See the case of *Daniels v. Potter*, *ante*, p. 262.

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1830.

BROAD *v.* THOMAS. July 9.

Seemle, that there is not any custom in London by which a ship owner is bound to pay commission to a broker who obtains the signature of a merchant to an *authority* signed by such owner, consisting of a paper partly printed and partly written, referring to the principal rate of freight, but containing the words "subject to the usual clauses in this trade," although a charter-party be prepared, which would have been executed but for the refusal of the owner to undertake the voyage. Nor in such case is the broker entitled to recover any remuneration for his work and labour.

The plaintiff sued as the surviving partner of a Mr. Richardson, with whom he had carried on the business of a broker, and sought to recover against the defendant, the captain of a ship called the *Betsey*, a certain sum of money, as a remuneration for the services of the firm, in endeavouring to obtain a freight for that vessel. It appeared that the defendant had given to Messrs. Richardson *339] and Broad, a paper in the following terms, which paper was partly a printed form having certain parts filled up in writing:—

"Gentlemen—I hereby authorize you to charter my vessel, the *Betsey*, of one hundred and sixteen tons, lying at Horsleydown, for a voyage to the Canaries and back to London, at 32*s.* per ton for barilla, 42*s.* per ton for wine, 70*s.* for orchilla or rock moss, 5*l.* per cent. primage, and ten guineas gratuity for the outward goods; pilotage to the Downs and extra lights paid as customary; thirty-five days for loading at the Canaries and unloading in London, subject to the usual clauses in this trade. This authority to hold good until ———

WILLIAM THOMAS.

"London, 8th July, 1829.

"To Messrs. Richardson and Broad, Ship agents, 1 Fen-court, Fenchurch Street."

Messrs. Richardson and Broad applied to Mr. Emden, a merchant, who

agreed to the terms proposed in the paper, and signed his name under that of the defendant. Upon this, a charter-party was prepared, according to those terms; but the defendant refused to sign it, when it was tendered to him, saying, according to the evidence of a lad called on the part of the plaintiff, that *he was willing to pay the brokers*, but he had another freight offered him, and he could not go the voyage in question. This charter-party was not produced.

Mr. Emden, the merchant, was called as a witness, and stated, that he was ready to have performed his contract, in every sense of the word, if the defendant had been willing to execute the charter-party. He added, that the same brokers afterwards procured him another vessel.

On the part of the plaintiff, several brokers were called. One of them, a Mr. Arnold, stated, that, in his *experience, where a memorandum was drawn out, having all the substantial particulars, such as the rate of freight, the number of landing days, and all the leading parts of a charter-party, reduced into writing, and leaving only the technical parts to be supplied by the broker, the practice was for the broker to hold the captain responsible, where the refusal to execute the agreement was on the part of the ship owner. [340]

Another broker, a Mr. Barry, stated, that 5*l. per cent.* on the amount of freight was the usual commission on a voyage to the Canaries, and that the broker was always paid when such a paper as that in question had been signed, and the owners afterwards refused to execute the charter-party. On his cross-examination, the witness stated, that he knew of fifty instances of the kind, though he could not recollect the names of any of the cases; that he had himself a disputed case of the sort in Ireland, which was decided in his favour; he added, that printed papers, like the paper in question, had been in use to his knowledge for about eighteen years, and that it was usual to pay the commission if the memorandum or authority was signed by the merchant and the owner.

Another broker, named Sowerby, stated, that where such a memorandum was signed, the practice was for the broker to receive 6*l. per cent.* commission, and that an instance of the kind had occurred to him about a year before. On his cross-examination, he was unable to mention any other specific instance. On his re-examination, he said, that where a *charter-party* was signed and broken off by the captain, it was the practice to pay commission.

TINDAL, C. J. There is no doubt that the right of the broker to commission attaches as soon as the charter-party is signed, and the question is, whether this memorandum amounts to a charter-party.

Taddy, Serjt., for the plaintiff, in opening the case, *referred to Hammond v. Holiday, 1 C. & P. 384, in which Lord Wynford, then Lord Chief Justice Best, is reported to have said:—"The law, as it relates to *commission*, I take to be this—a man must do all that is required of him, before he is entitled to charge for it: but, although he does not do the whole, yet he may be entitled to *remuneration* in proportion to what he has done." [341]

Wilde, Serjt., then addressed the Jury for the defendant. A man employs a broker to advance and protect his interests. The question in this cause is, whether, when there is no contract between the merchant, who is to supply the freight, and the owner who is to carry the goods to earn the freight, the broker is entitled to charge commission. The paper relied on is no more a charter-party when signed, than an authority to make an agreement is the agreement itself. The words used in it are, "*subject to the usual clauses*," and not on the usual terms. Is there to be no room for penitence on the part of the owner? Is he to have no option as to the merchant? The paper in question is merely an authority; and there is no pretence for calling it a charter-party. As to the conversation in which the defendant is stated to have said, that he would pay, before he had been told that the brokers had done anything for the money, it must be taken, that more passed than is given in evidence: and this appears from the mode of conducting the plaintiff's case. If it were intended to rely upon the promise to pay, why was all the evidence produced with respect

to the right to commission. The evidence of the brokers who have been called on the part of the plaintiff, is very loose and inconclusive on the subject.

For the defendant, several brokers were called. The first was a Mr. Pirie, *342] who stated, that he had been a broker *for thirty years; and that, according to his experience, commission was not due if the charter-party was not agreed. He stated, also, that he had had memoranda of agreement signed by both parties, and a charter-party signed by both parties, and the matter had gone off, and he had never charged commission even in such a case, and had never known it paid. On his cross-examination he said, that he did not know of any instance, in which, under such circumstances, it had been demanded and refused; that he never saw a paper like that in question so signed before, and that the practice in London was, to take a verbal authority and then prepare an agreement to be signed, and afterwards get a charter-party prepared by a notary. In answer to questions from the Lord Chief Justice, he said, that it was usual to communicate to the owner the name of the merchant, and that he had a right to object to the solvency of the merchant; and also that it was usual to have clauses in the charter-party, showing when and how the freight was to be paid.

Another broker, named Masson, was then called, who said, he had been a broker twenty-three years, that it was not usual to charge commission if a charter-party was not signed; and that the name of the merchant was always communicated before the charter-party was considered as concluded. On his cross-examination, he stated, that commission was not due where *an agreement* was signed by both parties, and the matter went off by the refusal of the owner to carry it into effect; and instanced a case of his own, in which he detained the ship's papers on a claim of lien for commission, he having prepared the heads of a charter-party, which were signed by both parties, and the charter-party itself prepared and engrossed, and both draft and engrossment read over to, and approved by, both parties, and the voyage actually begun; and on an action being brought against him, his claim of lien was not allowed, and the plaintiff had a verdict. He further stated, that it was always the course to sign an *343] agreement *previous to the charter-party; that he had known owners break off a treaty, because they disliked the voyage, and considered the expenses higher than they at first expected; but he could not recollect any instance where the owner refused, because he could get a better freight.

Another witness was then called, who stated that he was present at a conversation between Messrs. Richardson & Broad and the defendant, in which nothing was said about his having previously promised to pay them; but in which he said he would not pay, and they replied, that they would make him; upon which he told them that they might do their best, for he should not go the voyage in question; his owners had engaged him to go elsewhere, and he could not go. This witness, who was also a broker, said, that it was not usual to pay commission, unless the vessel was actually loaded.

Taddy, Serjt., in reply. The broker is to be paid at the time when there is a binding contract; and no lawyer can doubt that this paper constitutes a binding contract, which might be declared on if no other were prepared. The signature of Emden to this paper was sufficient to enable the defendant to sue him. The question is, whether there was a binding contract, by which Emden the merchant could be fixed; for, if there was, then the broker is entitled to be paid for having done that for his principal which would bind the adverse party. There was no doubt as to Emden's responsibility; there is no objection made on that ground, nor was it ever alleged as a reason for not completing the arrangement.

TINDAL, C. J. (in summing up.) This action is brought to recover a customary commission of *5l. per cent.* It is claimed as a *customary* payment; for, if an action were brought by a broker for his work and labour, in many cases the remuneration on a *quantum meruit* would fall very far short of the amount

of commission. There are *different degrees of labour in different cases, and for these the charge of commission creates an average payment. [344] The custom, as far as it is proved, must be grounded on this, that the claim of commission attaches wherever there is a binding contract for the freight. The question, and the only question referring to the custom which has been proved is, whether enough has been done in the particular case, by the particular party, to bring him within the rule. It seems to be the case, at least there is no evidence to the contrary; and therefore it may be assumed, for the purposes of this cause, that when the charter-party is actually signed, the broker is entitled to commission. It is clear that the paper in question is not a formal charter-party. It is a mere authority, commencing as an authority to the brokers, written by the owner, not contemplating that it would be signed by the merchant, but contemplating some further instrument to contain the terms between the parties. It contains the words, "*subject to the usual clauses in this trade.*" Now, not one of these clauses is inserted in the body of the paper. There are also the words, "*this authority to hold good until —.*" It seems to have been very loosely drawn, as there is a blank left for the time during which it was to be in force. Unless it was signified to Thomas, the defendant, that this contract was signed by Emden, the merchant, it cannot be considered as binding between the parties. This paper, therefore, not being a charter-party, the question for you will be, whether, upon the evidence which has been laid before you, you are satisfied that there is a custom in the city of London, that the mere circumstance of the signature of the merchant to the authority to the broker, without the execution of any charter-party, shall be sufficient to bind the captain to pay commission. The charter-party which was prepared has not been produced; we cannot, therefore, judge, whether it was properly drawn up, or whether it relates to this transaction at all. The authority appears to be dated on the 8th of July, and there is *certainly evidence on the part of the plaintiff, that, on the 9th [345] July, the defendant said, in conversation, that he was ready to pay the brokers; but, it will be for you to say, whether that is correct, connecting it with the inference very strongly to be drawn from the evidence, on the part of the defendant, of what occurred in a subsequent conversation, in which no reference was made to any previous promise to pay having been made. But it does not much matter whether it is correct or not, because the commission is claimed as a customary payment, and it does not seem to me, that an unguarded expression, used while the party was ignorant of whether he was liable to pay or not, will be sufficient to make him liable, if it appear afterwards that the broker was not entitled to receive it. It seems to me, that, unless the owner knows the authority he gives to his broker will be made use of as the contract between the parties, the agent who so uses it exceeds his authority, and the owner will not be bound by his act. One instance of course will not prove a custom, because the very object of a custom is to supersede the necessity of making agreements between the parties, from the presumption which arises from the uniformity and generality of the practice on the subject. If you think there is no such custom as that which the plaintiff sets up, then you will find your verdict for the defendant, but if you think that such a custom has been proved, then you will find for the plaintiff, and give him the amount of 16*l.* 9*s.* Verdict for the defendant.

Taddy, Serjt., and *Follett*, for the plaintiff.

Wilde, Serjt., and *R. V. Richards*, for the defendant.

[Attorneys—*R. White*, and *Burford*.]

Vide the case of *Dalton v. Irvin*, *ante*, p. 289, and the authorities there referred to. In the case of *Reed v. Rann*, *10 B. & C. 438, it was held, that where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the ship owner, to recover the commission, or a compensation for his work and labour. [346]

WILLIAMS and Others v. WOODWARD, Gent. Oct. 23.

In an action to recover back money paid by a banker on a check, and afterwards allowed to his customer, on a suggestion that the check had been forged; the question in such action being, whether the check in fact was a genuine instrument or not?—the notes of the magistrate's clerk, of statements made by the customer on a charge against the person supposed to have forged the check, are receivable in evidence, though his deposition was afterwards regularly signed pursuant to the statute.

ASSUMPSIT to recover back a sum of 150*l.*, being the amount of a check, purporting to be signed by the defendant, which the plaintiffs, who were bankers, had paid, and afterwards allowed him in account, on a suggestion that the check was a forgery.

On the part of the plaintiffs, one of their cashiers was called, who swore that he believed the signature to the check in question to be in the defendant's handwriting; and he further stated, that, on Monday, the 5th November, the check having been paid on Saturday, the 3d, the defendant came to the banking-house, and stated, that the signature was not his, and offered to make oath of the fact. On his cross-examination, he said, that the plaintiffs supplied their customers with printed forms of checks; and that the latter generally drew on them by such checks; and that, by a printed notice, they specially desired that their customers would use them; but that, notwithstanding, it was their practice to pay written checks, if they thought the signature genuine. It further appeared, that the defendant had represented to the bankers that the check had been written on a piece of paper containing his signature, which was lying in his office, by a person, named Jones, who was his clerk. This last representation was made after Jones had been taken into custody, on a charge of having forged the check. In consequence of what the defendant said, on the Monday, to the bankers, they caused the following entry to be made on the credit side of his *347] *account in their books: "November 5th, 1827, Charles Woodward, by Williams & Co., for forged check, 154*l.*"

The defendant was the secretary to one of the London Gas Companies, of which one of the plaintiffs was the treasurer, and Jones was in the constant habit of going backward and forward from the defendant to the banking-house, on the business of the company. The bankers' clerk, who was examined, was not able to mention any instances in which the plaintiff had sent checks not in the printed form.

Mr. Hobler, the chief clerk at the Mansion House, was called as a witness, and produced his minutes of the evidence, given before the Lord Mayor, on the examination of Jones, and was asked to read his account of what was then said by the defendant.

Russell, Serjt., having ascertained from the witness that depositions had been prepared and signed by the witnesses, objected to the reading of the original minutes, on the ground that the best evidence was the account reduced into the form of a regular deposition, and signed by the party, pursuant to the provisions of an Act of Parliament.

TINDAL, C. J. I think it is admissible. It is important to see whether this gentleman has always given the same account, or has occasionally given different accounts of the transaction.

The clerk who paid the check was examined before the Grand Jury, on an indictment for forgery against Jones, but had since become insane, and could not therefore be examined at the trial. The defendant also went before the Grand Jury. The bill was returned by them, "Not found."

Wilde, Serjt., for the plaintiffs, referred to *Young v. Grote*, 12 B. Moore, 484, *348] as an authority to show that the *bankers were justified in paying a check, which contained a genuine signature.

Russell, Serjt., for the defendant. *Young v. Grote* has nothing to do with the present question. That was the case of a blank check signed by the customer, which was filled up by a clerk, in such a way as to leave room for the insertion

of a larger sum. But the real question in this case, as I conceive, is, whether the plaintiffs are at liberty, on the state of facts proved, to recal and retract a payment made by them on the 5th of November. They have undertaken to show, that there was no forgery at all. They have brought this action in consequence of the Grand Jury's having thrown out the bill for forgery, as they infer, from that circumstance, that a Jury here will say that the check was a genuine instrument.

TINDAL, C. J. This is an action brought to recover a sum of 154*l.*, which the plaintiffs say, they have paid under a mistake. In point of fact, the question is, whether, upon the evidence, they are at liberty to claim that money again, and that will depend upon whether the instrument was genuine or not; for, if it was genuine, and they found it out afterwards, they might rescind the payment. The burthen of proof is on the plaintiffs. It is for them to show, in this case, that the instrument was genuine. An instrument is as much a forgery, if the name has an order for payment written over it, without any intention in the signer that the signature should authenticate the instrument, as if the whole is forged. There is no positive affirmative evidence that the defendant had ever authorized Jones to draw checks for him.

The Jury found a verdict for the plaintiffs, but said, that, in their opinion, there was not any imputation on the character of the defendant.

* *Wilde*, Serjt., and *R. V. Richards*, for the plaintiffs.

Russell, and *Jones*, Serjts., for the defendant.

[Attorneys—*Gates*, and *In Person*.]

[*349]

STEPHENS v. MYERS. July 17.

A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have almost immediately reached B., if he had not been stopt:—Held, that it was an assault in point of law, though, at the particular moment when A. was stopt, he was not near enough for his blow to take effect.

ASSAULT. The declaration stated, that the defendant threatened and attempted to assault the plaintiff. Plea—Not guilty.

It appeared, that the plaintiff was acting as chairman, at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made, that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopt by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence, contended, that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat—there was not a present ability—he had not the means of executing his intention at the time he was stopt.

TINDAL, C. J., in his summing up, said—It is not every threat, when there is no actual personal violence, that *constitutes an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopt; then,

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though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages, as you think the nature of the case requires.

Verdict for the plaintiff—Damages, 1s.

Andrews, Serjt., and Steer, for the plaintiff.

Spankie, Serjt., and Theiger, for the defendant.

[Attorneys—*J. T. & H. Baddeley, and Baker.*]

SITTINGS AT WESTMINSTER, AFTER MICHAELMAS TERM, 1830.

HANWAY v. BOULTBEE and MARY his Wife. Nov. 30.

FALSE IMPRISONMENT. A., a hawker, went to the house of B. to sell goods, and a dog of B. coming out of the house, A. knocked out one of its eyes, for which B.'s wife caused A. to be apprehended—Held, that it was for the Jury to say, whether A. had struck the dog for his own preservation, and fairly to protect himself; or whether it was a wilful and malicious trespass on his part. To justify the apprehension of an offender under the malicious injuries act, 7 & 8 Geo. 4, c. 30, the offender must be taken in the fact, or on a quick pursuit.

TRESPASS. The first count of the declaration stated, that the defendant, Mary, being the wife of the other defendant, on the 12th day of October, 1829, seized and laid hold of the plaintiff, and forced and compelled him to go along *351] a certain public highway, to the dwelling-house *of a certain magistrate, and then and there imprisoned him, &c., for the space of six hours. The second count stated that the defendant Mary, then and still being the wife of the other defendant, assaulted the plaintiff. The third count stated, that the defendant Mary, then and still being the wife of the other defendant, seized and took a certain pack, and certain goods of the plaintiff, (enumerating them.) Pleas—First, the general issue; second, a justification under the stat. 7 & 8 *352] Geo. 4, c. 30.(a) Replication—*That the defendant Mary, of her own wrong, committed the trespass attempted to be justified.

(a) As a plea framed under this act is not to be found in any of the printed collections, a copy of it may be acceptable.

Plea.—And for a further plea in this behalf as to making an assault upon the said plaintiff, and seizing and laying hold of the said plaintiff, and forcing and compelling the said plaintiff to go from and out of a certain dwelling-house of the said defendant Richard Moore Boulton, into a certain public highway, and in and along divers public highways, to the dwelling-house of the said magistrate, in the said declaration mentioned, and on that occasion imprisoning and keeping and detaining the said plaintiff in prison for a certain small space of time, part of the said time in the said declaration mentioned, the said defendants, by leave of the Court here for that purpose first had and obtained, according to the form of the statute in that case made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action against them the said defendants, because they say, that the said plaintiff heretofore, to wit, at the said time when, &c., to wit, in the county aforesaid, wilfully committed damage and injury to and upon certain personal property of the said defendant Richard Moore Boulton, to wit, to and upon a certain dog of the said Richard Moore Boulton, of great value, to wit, of the value of 2l., that is to say, by then and there wilfully beating and wounding the said dog, with a certain large stick, or club, and thereby knocking and beating out one of its eyes, whereby the said dog became and was greatly injured and damaged, and rendered of much less value to the said Richard Moore Boulton, the said plaintiff not then and there acting as aforesaid under a fair or reasonable supposition that he had a right to do the act aforesaid, and the said trespass not being committed in hunting, fishing, or in the pursuit of game, contrary to the form of the statute in that case made and provided. And the said defendants further say, that the said plaintiff was then and there, at the said time when, &c., found committing the said offence against the said statute, whereupon the said defendant Mary, then and there being the wife and servant of the said other defendant, at the said time when, &c., did immediately apprehend the said plaintiff, and take him before a neighbouring justice of the peace, to wit, before the said magistrate in the said declaration mentioned, the same being then and there a justice of the peace in and for the county and place wherein the said offence was so

It appeared that the plaintiff, being a hawker and pedlar, went in the way of his business with his pack of goods to the house of Mr. Boulton, and that a Scotch terrier dog of Mr. Boulton came out of the house and ran at the plaintiff, who with a stick gave the dog a blow which knocked out one of its eyes. The plaintiff then went away, and Mrs. Boulton immediately sent a boy to fetch a constable. The boy returned with the constable, and Mrs. Boulton directed them to go after the plaintiff and apprehend him for the injury done to the dog. The constable and boy went in pursuit of the plaintiff, and overtook him at a distance of about a mile from Mr. Boulton's house. The constable took him to Mr. Boulton's, and took his pack from him, Mrs. B. desiring the constable to *put the pack in a room there, which was done. The plaintiff was [*353 taken before a magistrate, and was afterwards allowed to depart.

TINDAL, C. J. (in summing up.) To authorize the imprisonment of the plaintiff, under the Act of Parliament 7 & 8 Geo. 4, c. 30, (a) the plaintiff must have committed either a wilful or a malicious injury. The first question is, whether this was a wilful injury to the dog. It does not appear that the dog was of a description to be dangerous, or that it was at all necessary that the plaintiff should have struck it. You will therefore say, whether the plaintiff struck this dog for his own preservation, and fairly to protect himself, or whether it was a wilful and malicious trespass on his part. There is also, besides this, another question. It is necessary, under this act of parliament, that the party apprehended should be taken in the fact, or else in quick pursuit. (b) In this case, a boy is sent for a constable, and they, having received their directions from Mrs. Boulton, are sent in pursuit of the plaintiff, and find *him a mile off. You will therefore say whether this [*354 was or was not an apprehension on a quick pursuit. With respect to that part of the case that regards the pack, the question will be, whether the plaintiff left his pack as a voluntary deposit, or whether it was taken by order of Mrs. Boulton. For, this being a joint action against husband and wife, it is essential that it should have been done by Mrs. Boulton. (c)

Verdict for the plaintiff—Damages, 10l.

committed, to be dealt with according to the law; and, in so doing, the said Mary did necessarily seize and lay hold of, and cause the said plaintiff to be seized and laid hold of, and did necessarily compel and force him to go from and out of the said dwelling-house of the said Richard Moore Boulton, into the said highway, and in and along the same, and the said other highways, to the dwelling-house of the said magistrate as aforesaid; and the said Mary did then and there, as such wife and servant as aforesaid, give information and make complaint to the said magistrate against the said plaintiff, for the offence aforesaid, and so the said plaintiff for the offence aforesaid, the said Mary did necessarily imprison, and keep and detain the said plaintiff in prison, for a certain small space of time, to wit, for the space of one quarter of an hour, while she the said Mary was taking the said plaintiff to the said dwelling-house of the said magistrate as aforesaid, and so giving such information, and making such complaint as aforesaid, as it was lawful for her to do for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned; and whereof the said plaintiff hath above complained against her. And this the said defendants are ready to verify, &c.

(a) By the stat. 7 & 8 Geo. 4, c. 30, s. 24, any person who shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property, may be compelled by a magistrate to pay a reasonable compensation; and if he does not, may be committed. See this sect. Carr. Supp. 353. With respect to the question whether dogs are personal property, see the case of Ireland v. Higgins, Cro. Eliz. 125, where a plaintiff recovered in trover for a greyhound. In that case there is another case cited, where a person was held to be justified in committing an assault, to keep possession of his dog.

By sect. 28 of this statute it is enacted—"That any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring Justice of the peace, to be dealt with according to law."

By sect. 41 of this act, defendants are entitled to notice of action, and may plead the general issue, &c. See this section, Carr. Supp. 350.

(b) See the case of Rex v. Curran, 3 C. & P. 397.

(c) In Con. Dig. tit. Trespass, (C. 1), it is laid down, that trespass lies "against all who procure or command it, [4 Inst. 317], or against him who afterwards assents to a trespass done for his use or benefit, though not privy at the time of doing it. [Ib.] So, if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing the goods in seizure, though not privy to the misusage. [Lane, 90]." See also Butler v. Turley, 2 C. & P. 585.

Taddy, Serjt., and *Tomlinson*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attorneys—*Sylvester & W.*, and *Gresley*.]

LEWIS v. ARNOLD and Others. Dec. 10.

If three persons be told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, and demand the return of their money; and such persons are not justified in getting into a private box in the theatre, and, if they do, the proprietor may remove them, using no more force than is necessary—and if, in going out of the theatre, one of them strike a servant of the proprietor's in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the Jury shall be satisfied that they were acting with a common purpose.

ASSAULT and false imprisonment. Pleas—The general issue, and several pleas of justification, which stated in substance, as to the assault, that the defendant Arnold was possessed of a certain theatre, and that the plaintiff was unlawfully in a certain part of the said theatre, and that he was requested to depart; and not going away from it upon request, the defendant Arnold caused *355] him *gently to be removed; and, as to the imprisonment, that the plaintiff was making a noise and disturbance in the lobby of the defendant Arnold's theatre, and was requested to depart; but that he would not; and that, as one Rusher, a servant of the defendant Arnold, was attempting to remove him, he, in the view of one Bond a constable, committed an assault on Rusher; and therefore he was taken into custody, and imprisoned. Replication—*De injuriâ* to each of the pleas of justification.

It appeared that Mr. Arnold was the proprietor of the English Opera House, and that, on the evening of the 1st of August, 1829, the plaintiff went to the pit of that theatre at half price. The theatre was very crowded, and the witnesses for the defence stated, that it had been announced that there was only standing room in the pit; but, as to this, the evidence was contradictory, it being proved on the other side, that the plaintiff was told there was plenty of room. The pit being in a very crowded state, the plaintiff and two other persons climbed from the pit into a private box. They were told that they must not stay there unless they paid 2*l.* 2*s.*, which was the price of the box. This they refused, but offered to pay the price of the public boxes. This was refused by the box-keeper, and the plaintiff and the two other persons were taken out of the private box through a lobby which led into the street. One of the other two persons then asked to be suffered to go back into the pit. They were told that, on going round by the street, they would be again passed into the pit by a servant of the theatre, who would go round with them. This the person refused, and insisted on going back to the pit by the way he had come from it; and in this dispute one of the other two persons, and not the plaintiff, gave a servant of the theatre, named Rusher, a blow, whereupon the plaintiff and the two other persons were taken into custody.

*356] *Bompas*, Serjt., in reply contended, that the fact of *another person having struck Rusher, did not authorize the imprisonment of the plaintiff.

TINDAL, C. J. (in summing up.) Even if this plaintiff had been informed that there was room in the pit of this theatre, when there was not, which on this evidence is matter of doubt, he had still no right to go into this private box. His proper course, if there was not room, was to go out of the theatre and demand the return of his money.(a) If there were to be an idea, that

(a) At the bottom of play-bills there are the words "No money to be returned." This applies to a practice that prevailed at the theatres some years ago, which was this:—If a person entered the theatre, and could not get so good a place as he liked, he might, before the curtain drew up, have his money returned to him and leave the house; but this practice was

those who had not room in the pit might get into the boxes, the greatest inconvenience would ensue. Mr. Arnold had therefore a right to turn the plaintiff out of the private box, using no more force than was necessary. With respect to the imprisonment, if there was a blow given in the lobby, in the presence of the peace-officer, it was his duty to interfere and secure the offender. It then becomes material to consider, whether the plaintiff was acting jointly with the other person in committing a breach of the peace in the presence of the constable. It is said that the plaintiff himself did nothing; that, no doubt, is so; but the question is, did he withdraw himself from the others, or were they all active in one common purpose. It appears that they had all three got into the private box together, and they were all together in the lobby; and I cannot find anything to separate this plaintiff from the other two. If, therefore, you think that these three persons were acting in a common purpose, the plaintiff was liable to be apprehended *although the blow was not given by him, [*357 but by one of the other two persons who were with him.

Verdict for the defendants.

Mereweather and *Bompas*, Serjts., and *Hutchinson*, for the plaintiff.

Wilde, Serjt., and *Arnold*, for the defendants.

[Attorneys—*Spyer*, and *Mayhew & J.*]

discontinued, on the ground that it gave a great facility to pickpockets to enter the theatre with the crowd, for the purpose of picking pockets, and then to have their money returned, and go away.

PROMOTIONS.

IN the Vacation after Trinity Term, William Horne, Esq., one of his Majesty's counsel, was appointed to be Attorney-General to her Majesty, Queen Adelaide, and John Williams, Esq., one of his Majesty's counsel, was appointed to be her Majesty's Solicitor-General.

In Michaelmas Term, Mr. Justice Bayley resigned his office of one of the Judges of the Court of King's Bench, and was appointed one of the Barons of the Exchequer. W. E. Taunton, Esq., and John Patteson, Esq., were appointed Judges of the Court of King's Bench, and Edward Hall Alderson, Esq., was appointed a Judge of the Court of Common Pleas.

In the same Term, Henry Brougham, Esq., was appointed Lord Chancellor, and created a peer, by the title of Baron Brougham and Vaux. T. Denman, Esq., resigned his office of Common Serjeant, and was appointed his Majesty's Attorney-General, *vice* Sir J. Scarlett; and at the same time, W. Horne, Esq., was appointed his Majesty's Solicitor-General, *vice* Sir E. B. Sugden.

In the same Term, John Williams, Esq., was appointed Attorney-General to her Majesty, and C. C. Pepys, Esq., Solicitor-General to her Majesty.

*In the same Term, George Heath, Esq., was called to the degree of [*358 Serjeant-at-Law.

In the Vacation after Michaelmas Term, the Honourable C. E. Law was appointed Common Serjeant.

In the same Vacation, Robert Spankie, Esq., Serjeant-at-Law, received a patent of precedence, to take rank next after F. Pollock, Esq., one of his Majesty's counsel, and D. F. Jones, Esq., Serjeant-at-Law, received a patent of precedence, to take rank next after the Honourable C. E. Law, one of his Majesty's counsel; and Thomas Coltman, Esq., was appointed to be one of his Majesty's counsel.

*359] *OXFORD SUMMER CIRCUIT. 1830.

BEFORE MR. JUSTICE PARK, AND MR. JUSTICE BOSANQUET.

OXFORD ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

WICKENS v. EVANS. *July 22.*

Three persons in the same line of business had "agreed to divide, and not to interfere with certain districts of the several cities, boroughs, &c., set forth on Bowle's Post map of England and Wales, thereto annexed and referred to;" and that the three parties should respectively sell without interruption, in the several cities, &c., marked and set forth, and described in the said map, which was annexed to the agreement:—Held, that all the names of places on the map must be counted as words; and that, if the words of the agreement, with the names on the map, amounted to more than 1060, the agreement must be stamped accordingly with a 1*l.* 15*s.* stamp.

ASSUMPSIT on a written agreement.(a) Plea—General issue.

The agreement, which was between William Fletcher, of the first part; the defendant, of the second part; and the plaintiff, of the third part; recited, that, whereas the said William Fletcher, Daniel Evans, and Joseph Wickens had, for several years last past, travelled into various parts of the country, vending trunks *360] and boxes for sale, *but, on account of the inconvenience and loss which they severally acknowledged to sustain, by reason of their exercising their trade and calling in places which they wished to keep separate and distinct from each other, they, the said William Fletcher, Daniel Evans, and Joseph Wickens, had, in consideration thereof, agreed to divide the same, and enter into the terms and conditions thereafter mentioned relative to such division (that is to say), the said William Fletcher, Daniel Evans, and Joseph Wickens did thereby, severally and respectively, agree with each other to divide, and not interfere with, certain districts of the several cities, boroughs, towns, and villages, set forth on Bowles's Post-map of England and Wales, thereto annexed and referred to, and signed with the respective proper handwriting of the said William Fletcher, Daniel Evans, and Joseph Wickens, it being the true intent and meaning of the said parties thereto, and of those presents, that the said William Fletcher should and might, at all times thereafter, during the life of the said William Fletcher, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said Daniel Evans and Joseph Wickens, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on the said map, as aforesaid; and also, that the said Daniel Evans should and might, at all times thereafter, during the life of him the said Daniel Evans, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said William Fletcher and Joseph Wickens, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on

(a) For the form of the declaration, see the case of Wickens v. Evans, 3 Y. & J. 318. In that case it was held, that this agreement was good in point of law, it being there contended to be bad, as an agreement in restraint of trade.

the said map, as aforesaid; and also, that the said Joseph Wickens *should and might, at all times thereafter, during the life of him the said Joseph Wickens, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said William Fletcher and Daniel Evans, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink and set out with black cotton, so set forth and described on the said map as aforesaid. And it was thereby further agreed by and between the said parties thereto, that they, and each of them, should also be at liberty to travel, for such purposes of trade as aforesaid, during their joint natural lives, as aforesaid, to all such other places as might thereafter be built, although not set forth on the said map, so as such trading should not interfere with either of the said districts of the said parties thereto, so respectively marked out on the said map, as aforesaid; and also, it was thereby further agreed by and between the said parties thereto, that they should not, directly or indirectly, allow or suffer any goods in their said trade to be manufactured at their respective shops or warehouses, or be sent from their or his respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of, on the ground to be travelled by the said parties thereto, so marked out on the said map, as aforesaid, or in any manner whatsoever participate in any profits arising from any sale of the said goods in such respective districts as aforesaid, and so thereby agreed to be divided as aforesaid; and also, should not aid and assist any person or persons whomsoever, to oppose all, any, or either of the said parties thereto, in the said trade, in England and Wales; and it was thereby further mutually agreed by and between the said parties thereto, that they and each of them should not, nor would, during their joint natural lives, as aforesaid, buy or purchase any tea chest or chests, black or green, at a higher price than 6*d.* or 8*d.* each in Oxford; *and it was thereby lastly agreed by and between all the said parties thereto, that they should not, by themselves, or either of them by himself, nor should their, or either of their servants or agents in that behalf, travel into the districts of each other, so set forth on the said map, or into any other place which might be thereafter built, forming the route of either of the said parties thereto, in the way of their or his said trade and business, to the injury or prejudice of each other. [*361

Annexed to this agreement was a map of England, with black cotton stitched through it, so as to divide the kingdom into three districts.

The agreement bore a 1*l.* stamp. It was admitted, that it did not, by itself, contain 1080 words.

Taunton, and *Chilton*, for the defendant, objected, that the stamp was not sufficient; for that, as the map was annexed to the agreement, and referred to in it, the names of all the places on the map were to be counted as words, the same as if they had been inserted in the agreement, and the agreement would then require a further stamp, as it would contain more than 1080 words.

Jervis, and *Talfourd*, *contra*, contended, that, as the map was only referred to for the boundary lines, the names of the places ought not to be counted.

Mr. Justice BOSANQUET held that the names of the places on the map ought to be counted as words; and that, the number of words, including those, being above 1080, the stamp was not sufficient. Nonsuit.

Jervis, and *Talfourd*, for the plaintiff.

Taunton, and *Chilton*, for the defendant.

[Attorneys—*T. Parker*, and —.]

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*WORCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

REX v. JOSEPH PERKINS. July 24.

If a parish be partly situate in the county of W. and partly in the county of S., it is sufficient, in an indictment for larceny, to state the offence to have been committed "at the parish of H. in the county of W."

LARCENY. The offence was stated in the indictment to have been committed "at the parish of Hales Owen, in the county of Worcester." It appeared that the parish of Hales Owen was situate, partly in Worcestershire, and partly in Shropshire.

F. V. Lee, for the prisoner. I submit that this is badly laid. This ought to have been laid as "in that part of the parish of Hales Owen, which is situate in the county of Worcester." There is, in point of fact, no such parish as the parish of Hales Owen, in the county of Worcester; and it has been held by Mr. Justice Gaselee, that even since the stat. 7 Geo. 4, c. 64, s. 20, it is necessary that the offence should be laid to have been committed in some parish in the county, even in cases not local; and there is no such parish as that stated.

J. Jervis, amicus curiæ, stated, that this very objection had been overruled by Mr. Justice Littledale, with respect to this very parish.

Mr. Justice PARK. Knowing the extreme accuracy of my brother Littledale, in all matters of pleading, I have no difficulty in holding this good.

Verdict—Guilty.

Carrington, for the prosecution.

F. V. Lee, for the prisoner.

[Attorneys—*Hayes & Hinchcliffe*, and *Wilson*.]

*By the stat. 7 Geo. 4, c. 64, s. 20, it is enacted—"That no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper or perfect venue, where the Court shall appear, by the indictment or information, to have jurisdiction over the offence." In the case of *Rex v. Bullock* (Cor. 12 Ja.), Carr. Supp. 282, which was a case, before the passing of the stat. 7 Geo., 4 c. 64, the prisoner was indicted for breaking into a house and stealing to the amount of 40s. The house was laid to be in the parish of "St. Botolph, Aldgate," and it appeared that the parish where the house was situate, was "St. Botolph, without Aldgate." The prisoner was convicted of larceny; and the 12 Judges held that he was rightly convicted, as there was no proof that there was no such parish in the county as that named.

REX v. WILLIAM MOGG. July 26.

On an indictment for administering sulphuric acid to eight horses, with intent to kill them.

The prosecutor may give evidence of administering, at different times, to show the intent; but if the Jury are satisfied that the prisoner administered the poison under an idea that it would improve the appearance of the horses, they ought to acquit him.

If a prisoner mix poison with the corn intended for the feed of eight horses, and then gives each horse his feed from this mixture, an indictment, charging that he did administer the poison to the eight horses, is correct.

INDICTMENT for a misdemeanor. The indictment charged, that the prisoner did administer to one stallion, one horse, four mares, and three geldings, two ounces of a certain deadly poison, called *sulphuric acid*, with intent the said horses, &c., feloniously, maliciously, and unlawfully to kill. There was another count, which charged that he did attempt feloniously to kill the horses, by administering the poison.

It appeared that the prisoner mixed sulphuric acid with a quantity of corn,

and that, having done so, he gave each horse his feed, all the horses being in the same stable. The witness also stated that the prisoner did this frequently.

Greaves, for the prisoner, objected, that the prosecutor ought to confine himself to evidence of one act of administering.

Mr. Justice PARK. I must receive the evidence; other acts of administering may go to show whether it was done with the intent charged in the indictment.

Greaves. I submit that this indictment is bad, *because it charges the administering of the sulphuric acid to all the horses, as one offence, [*365 whereas, the giving it to each horse is a distinct offence.

Mr. Justice PARK. We have it in evidence, that the prisoner mixed the acid with the corn, and then gave each horse a portion of it. This is clearly a joint administering to all the horses.

Dr. Hastings, who was called to prove what the poison was, stated in his cross-examination, that sulphuric acid was sometimes given to horses by grooms, under an idea that it would make their coats shine.

Mr. Justice PARK left it to the Jury to say, whether the prisoner had administered the poison with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of the horses, for that, in the latter case, they ought to acquit him. Verdict—Not guilty.

Carrington, for the prosecution.

Greaves, for the defence.

[Attorneys—*Hayes & Hinchcliffe*, and *Wilson*.]

(a) By the stat. 7 & 8 Geo. 4, c. 30, s. 16, it is enacted—"That, if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." It should be observed, that, giving poison to a person's horse, however maliciously done, is no felony, unless the animal die; the words of the act being, "*kill, maim, or wound*."

*REX v. SARAH HIGLEY. April 28.

[*366]

A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes—the learned Judge directed an acquittal on the charge of endeavouring to conceal the birth.

MURDER. The prisoner was charged with the murder of her female bastard child. The evidence that the child was born alive was not sufficient, and the case therefore was proceeded in as to the concealment of the birth.

It was proved, that the body of the child was found at the house of the prisoner's father, in a bed, among the feathers; but by whom it was placed there, was not shown.

It appeared by the evidence on the part of the prosecution, that the prisoner told Mr. Pierpoint, the surgeon who attended the coroner's inquest, that she had had a child; and Mr. Pierpoint stated, in his cross-examination, that she in the same conversation told him that she had sent for a surgeon to attend her in her confinement, but that he was not at home; and Mr. Pierpoint also stated, that the prisoner's mother had, at the same time, showed him some clothes for an infant.

Mr. Justice PARK told the Jury that these facts went to negative the charge of concealment of the birth by the prisoner, and that they ought therefore to acquit her.

Verdict—Not guilty.

Godson, and *Lumley*, for the prosecution.

Carrington, for the prisoner.

[Attorney for the prosecution—*Parker*.]

By the stat. 9 Geo. 4, c. 31, sect. 14, it is enacted—"That if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said

child, endeavour to conceal the birth thereof; every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or House of Correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: Provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did by secret burying, or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the Court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth."

*367]

*SHROPSHIRE ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

OWENS v. PORTER. August 9.

If a person sell *two sorts* of spirits at the same time, to an amount above 20s., he may recover the price, although the amount of each species of spirits be under 20s.

ASSUMPSIT for goods sold. Plea—General issue.

A witness proved that the defendant gave the plaintiff an order for spirits, and that the latter sent him two quarts of brandy, at the price of 17s., and two quarts of whiskey, the price of which was 10s., all being delivered at one time.

J. Jervis, for the defendant, relied on the stat. 24 Geo. 2, c. 40, s. 12, by which it is enacted—"That no *item* in any account for distilled spirituous liquors shall be allowed where the liquors delivered at one time, *and mentioned in such item*, shall not amount to twenty shillings at the least, without fraud;" and he argued that the word *item*, in the Act of Parliament, referred to each particular species of spirits.

Wateley, for the plaintiff. The term *item* must relate to a delivery at one time.

Mr. Justice BOSANQUET. I think that this is not a case within the Act of Parliament. The quantity of spirits delivered at one time, though of two different kinds, exceeds 20s. The object of the act seems to have been, that, if a number of articles, each under 20s., are delivered at different times, it should not be lawful to charge them in one item, so as to make them amount to more than 20s.

Verdict for the plaintiff.

*368] **Wateley*, and *Dixon*, for the plaintiff.

J. Jervis, for the defendant.

[Attorneys—*Roberts*, and *Price*.]

By the stat. 24 Geo. 2, c. 40, after reciting—"That, whereas the immoderate drinking of distilled spirituous liquors by persons of the meanest and lowest sort hath of late years increased, to the great detriment of the health and morals of the common people," &c., it is by sect. 12 enacted, "That no person or persons whatsoever shall be entitled unto or maintain any cause, action, or suit for, or recover, either in law or equity, any sum or sums of money, debt or demands whatsoever, for, or on account of any spirituous liquors, unless such debt shall have really and *bona fide* been contracted at one time, to the amount of 20s. or upwards; nor shall any particular article or item in any account or demand for distilled spirituous liquors be allowed or maintained, where the liquors delivered at one time, and mentioned in such article or item, shall not amount to the full value of 20s. at the least, and that without fraud or covin, and where no part of the liquors so sold or delivered shall have been returned, or agreed to be returned, directly or indirectly." This act then goes on to prohibit the receiving of pledges as security for payment for spirits.

In the case of *Gilpin v. Rendle*, Selw. N. P. 61, it was held, that if part of the demand was not for spirits, that part might be recovered, although the other items of the account were for spirits, and not recoverable by reason of this act.

In the case of *Jackson v. Attrill*, Pea. N. P. C. 181, it was held, that the stat. 24 Geo. 2, c. 40, sect. 12, did not apply to cases where the spirits were bought for the purpose of being sold again.

In the case of *Burnyeat v. Hutchinson*, 5 B. & A. 241, there was a charge under 20s. for

spirituous liquors supplied to the defendant's guests. This formed an item in a tavern bill for an entertainment. It was contended that these liquors were only incidental to the entertainment, but Abbott, C. J., said, "The words of the act are free from doubt. They contain a general and absolute prohibition of the sale of spirits, unless delivered in quantities amounting to more than 20s. in value at one time. We are however desired to narrow the construction by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications; and I think, if we did so, we should probably defeat the intentions of the legislature."

In the case of *Scott v. Gilmore*, 3 Taunt. 226 (decided in the year 1810), it was held, that a bill of exchange given partly for spirits, furnished in less quantities than to amount to 20s. at a time, was void; however, in the following year, Lord Ellenborough, in the "case of *Spencer v. Smith*, 3 Camp. 9, held the contrary. And, in the case of *Dawson v. Rem-* [*369
nant, 6 Esp. 24, where items of this kind had been allowed in an account settled between the parties, Sir James Mansfield permitted the plaintiff to recover the balance struck by the parties, without deducting these items. His Lordship, however, reserved the point, but it seems never to have been moved.

In the marginal note of the case of *Scott v. Gilmore*, it is said, that "the statute 24 Geo. 2, c. 40, s. 12, making illegal the sale of spirits in less quantities than 20s. value, unless paid for, extends to spirits mixed with water." That is, however, hardly borne out by the case, because the bill of exchange in that case was given for money lent, "for spirits and spirits mixed with water," furnished in quantities not amounting to 20s. at one time. Now, according to that case, the spirits alone would have vitiated the bill. However, in the case of *Gilpin v. Rendle*, the plaintiff was not allowed to recover for "grog," which appears to decide this point.

BEFORE MR. JUSTICE PARK.

REX v. HANNAH HARLEY. August 11.

If a servant put poison into a coffee-pot which contains coffee, and, when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee—This is a "causing the poison to be taken," within the stat. 9 Geo. 4, c. 31, s. 11, and the servant is therefore indictable under that act. *Seemle*, that this is also an "administering," within that act; as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party.

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 11. The first count charged that the prisoner did "administer, and cause to be administered, to Sarah Smith, &c., a certain deadly poison called oxyde of arsenic." The third count charged that the prisoner did "cause to be taken" by the said Sarah Smith oxyde of arsenic. And the fifth count, that the prisoner "did attempt to administer" to the said Sarah Smith oxyde of arsenic. The second, fourth, and sixth counts were similar to the first, third, and fifth, except that they stated the poison to be white arsenic.

The evidence of Mrs. Smith was as follows—"I got up at about 7 o'clock. The kettle was on the fire, and the coffee-pot was by the side of the grate. I told the prisoner that she had better get her breakfast, as I thought she *needed it by that time. She said, she would not have any, it was in- [*370
tended for me. I said to her again, 'Did you put it for me?' and she said 'Yes.' I then toasted a slice off a roll, and was going to put out some tea; but, on the prisoner telling me that the coffee was for me, I put the tea-pot down, and asked James Thomas if he would have tea or coffee; and he saying he should like some coffee, I poured out some for him and for myself; and I drank it. I poured out a second cup for both, James Thomas drank about half his, and I drank the whole of mine. James Thomas complained that his coffee made him sick, and he left the room. I felt quite well at this time, but in about five minutes I became very ill indeed," &c. &c.

It was distinctly proved, that this coffee-pot contained arsenic mixed with the coffee.

C. Phillips, for the prisoner. I submit that there is in this case no evidence of an administering; there is no proof that the prisoner handed this coffee to Mrs. Smith. The mere mixing of poison, and leaving it in some place for the person to take it, is not sufficient to constitute an administering; it must be given into the hand of the party. In the case of *Rex v. Cadman*, R. & M. C. C. R. 114, it was considered that the swallowing of the poison was not essential, but that some of the poison must be applied to the person to whom it is administered; and that case clearly shows, that the delivery of the poison to the hand of the party is the main ingredient of the offence; and that, if the poison had been laid down, or left in a place to which the prosecutrix had access, that would not have been sufficient.

Mr. Justice PARK. There is another report of the case of *Rex v. Cadman*, Carr. Supp. 237, and the two reports differ materially. My memory is, that Mr. Carrington's report is accurate, and that the Judges held, that it was no administering, unless the poison was taken into the stomach.

*371] *C. Phillips*. My argument is, that unless there was a manual delivery to the party, it is not sufficient.

Mr. Justice PARK. If, according to the report you have cited, the delivery into the hand is not enough, and the taking it into the stomach is immaterial, I can hardly say what would be enough in any case. If I call in a physician, and he writes his prescription, and I take the medicines, is that not an administering by him?

C. Phillips. That is an act done by the physician. To constitute an administering it must be given and also taken.

Mr. Justice PARK. I have my own note of the case of *Rex v. Cadman*. That being a case on a Welch circuit, we certify our opinion under our hands. The Welch Judges have no right to reserve cases directly for the opinion of the twelve Judges. They petition his Majesty, who refers the matter to us, and we sign a letter stating our opinion; and of all such letters Lord Tenterden keeps copies. My note of the case is, that the Judges were unanimously of opinion that the poison had not been administered, because it had not been taken into the stomach, but only into the mouth.

C. Phillips. Administering is an act. Suppose the poison had been mixed and laid by for a month, and that a stranger had gone in and taken it. If that stranger had died, it would no doubt have been murder; but still there is no administering: and the indictment in such a case would charge, not an administering, but that the prisoner did maliciously lay the poison in a certain place, and that the deceased, not knowing it to be poison, took it. There is no count in this indictment which does not require an agency on the part of the accused. A "causing to be taken," includes an act, and so does an "attempt to administer."

*372] *Corbet*, for the prosecution. I was counsel in the case of *Rex v. Cadman*, and my recollection coincides with your Lordship's note, and with Mr. Carrington's book. I submit that, in the evidence of Mrs. Smith, there is evidence to go to the Jury on all the counts.

C. Phillips. When a new offence is created by an Act of Parliament, we must construe it to the very letter.

Mr. Justice PARK (in summing up). There has been much argument whether, in this case, there has been an administering of this poison. It has been contended, that there must be a manual delivery of the poison, and the law, as stated in Messieurs Ryan & Moody's Report, goes that way; but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated, that the Judges thought the swallowing of the poison not essential; but my recollection is, that the Judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion, that, to constitute an administering, it is not necessary that there should be a delivery by the hand. With respect to the question, whether the prisoner "did cause the poison to be taken"

by Mrs. Smith—it has been proved, that she said that she put the coffee-pot down for Mrs. Smith, and that upon this Mrs. Smith drank some of the coffee: and if you believe the evidence of Mrs. Smith, I am of opinion that this is a “causing to be taken,” within this Act of Parliament. Verdict—Not guilty.

Corbet, for the prosecution.

C. Phillips, for the prisoner.

[Attorneys—*Dansey*, and *Asterley*.]

By the stat. 9 Geo. 4, c. 31, s. 11, it is enacted—“That if any person unlawfully and maliciously shall administer or attempt to *administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and [*373 maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.”

REX v. HUGHES and Others. August 11.

Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude *in terrorem populi*. Several of the defendants had been convicted, and, at an ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except the words “*po. se.*” and “*guilty.*” written on the indictment, over the names of the convicted defendants:—Held, that this was no proof of an assault as against the present defendants, and that the present defendants could not be convicted of the riot only, as the indictment did not conclude *in terrorem populi*.

INDICTMENT against twelve defendants for a riot and assault. The indictment charged that the defendants unlawfully, riotously, and routously did assemble together to disturb the peace; and, being so assembled and gathered together, in and upon one John Watson, unlawfully, riotously, and routously did make an assault. It then stated that the defendants beat Mr. Watson, and tore down a booth. The indictment did not conclude *in terrorem populi*.^(a) Some of the defendants who had been in custody, were convicted at the previous assizes, but the remainder of them had traversed to the present assize.

Evidence was given to show, that there had been a considerable riot on the race-course at Shrewsbury, in which a booth belonging to the prosecutor had been pulled down and torn to pieces; but, owing to the absence of the prosecutor, no evidence was given of any assault upon him.

Curwood, and *Godson*, objected—That, as there was no proof of any assault, the defendants were entitled to be acquitted, because the indictment did not conclude *in terrorem populi*. If the assault had been proved, the parties *might have been convicted of that; but, as it was not, the only evidence was of a riotous assembling and destroying the tent, and they con- [*374 tended that the parties could not be found guilty of that part of the charge, because the indictment did not impute it to have been done *in terrorem populi*.

Busby, *contra*. By the indictment itself it appears, that several of the defendants have been convicted of a riotous assault.^(b) It is therefore proved by the record, that an assault was committed on the prosecutor. By the other evidence we have shown, that the defendants, who are now on their trials, were active in the riot; and, as in misdemeanor all are principals, I submit that we are in a condition to ask a verdict of guilty.

Mr. Justice PARK. The conviction of other parties is no proof of the assault, as against these defendants; and without proof of the assault, I am of opinion,

(a) The indictment was in the form given in Arch. Cr. L., for an indictment for a riot and assault.

(b) As to several of the defendants, the indictment had *po. se.* and “*guilty*” written over their names.

that these defendants cannot be convicted of the riot, as the indictment does not conclude *in terrorem populi*. The defendants must be acquitted.

Verdict—Not guilty.

C. Phillips, and *Busby*, for the prosecution.

Cuswood, *Bather*, *Corbet*, and *Godson*, for the respective defendants.

[Attorneys—*Armstrong*, for the prosecution, and *Lozdale*, and *Asterley*, for the respective defendants.]

*375]

*GLOUCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

WHITTUCK v. WATERS. August 24.

In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives; a register of burials of a Wesleyan chapel, is not admissible to prove the death of one of the *cestuis que vie*; nor is the evidence of a witness who heard in the family that another of the *cestuis que vie* was dead. *Semble*, that a copy of an inscription on a tomb-stone in the burial-ground of a Wesleyan chapel is also not evidence for this purpose.

ACTION, for the use and occupation of certain property which had been demised to the defendant for a term of years, determinable on three lives. It was opened on the part of the lessor of the plaintiff, that all the three *cestuis que vie* had died before the time from which the plaintiff claimed for the use and occupation.

To prove the death of one of them, a witness produced an examined extract from the register of burials, at the Wesleyan Chapel at Kingswood.

MR. JUSTICE PARK. I cannot receive the registers of the Wesleyan chapel as evidence of the death. (a)

The same witness, to prove the same death, produced a copy of an inscription from a tomb-stone in the burial-ground adjacent to the same chapel.

MR. JUSTICE PARK. I entertain very great doubts, whether this inscription is receivable in evidence. However, I will not reject it, and will let the case proceed.

*376] *The evidence as to the death of another of the *cestuis que vie*, was merely that the witness had heard in the family that the person was dead.

MR. JUSTICE PARK. That will not do. This is not a question of pedigree, where hearsay in the family is admissible.

This evidence was therefore rejected.

Another witness proved that he had said to the defendant, "Why did you not get your lease renewed before all the lives had dropped?" and that the defendant had replied, "The lives had dropped, and I did not know of it."

MR. JUSTICE PARK. I will leave the case to the Jury on this admission; but I shall also tell the Jury, that the defendant was speaking of a fact which did not appear to be within his own knowledge; and that, therefore, it is highly probable, that he said the lives had dropped, only because some one had told him so.

Russell, Serjt., elected to be nonsuited.

Nonsuit. (b)

(a) The Fleet registers have been repeatedly held not to be admissible in evidence to prove a marriage. In the case of *Leader v. Barry*, 1 Esp. 353, Lord Kenyon would not receive an examined copy of the register of marriages at the Swedish ambassador's chapel at Paris, as proof of a marriage. And in the case of *Huet v. Le Mesurier*, 1 Cox. Ca. 275, it was held, that a copy of a register of baptisms, kept in the Island of Guernsey, was not admissible.

(b) By the stat. 19 Car. 2, c. 6, persons on whose lives estates are held, are to be considered as dead, if they be absent seven years, and there is no proof that they are alive. And, by the

Russell, Serjt., and *Talfourd*, for the plaintiff.

Campbell, for the defendant.

[Attorneys—*Whittuck & B.*, and *Cary & Cross*.]

statute 6 Ann. c. 18, the reversioner, or person interested, may, once a year, by an application to the Court of Chancery, supported by affidavit, compel the production of the person on whose life the estate is held; and if the person be not produced, the reversioner may enter on the lands. As to when a party shall be presumed to be dead, see the case of *Doe d. Oldnall v. Deakin*, 3 C. & P. 402.

*BEFORE MR. JUSTICE BOSANQUET.

[*377]

REX v. JOHN BLICK. August 26.

If an indictment against a receiver state the principal felony to have been committed by A. B., whatever would have been evidence of the principal felony to convict A. B., is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if A. B. confessed the principal felony, that confession is admissible on the trial of the receiver, to prove the commission of the principal felony. *Scamble*, that the stealing of brass, fixed in tomb-stones in a church-yard, is a felony within the stat. 7 & 8 Geo. 4, c. 29, s. 44.

INDICTMENT for receiving stolen brass. The first count of the indictment stated, that, one Edwin Smith, at the General Quarter Sessions, &c., was convicted of stealing brass, fixed in the church-yard at Minchinhampton, that being a "place dedicated to public use," and that the prisoner received it, knowing it to be stolen. In another count, the stealing was stated to be by a certain ill-disposed person to the jurors unknown.

Evidence was given that the brass was fixed into many of the tomb-stones in the church-yard at Minchinhampton, and that it had been stolen, and it was also proved that a considerable portion of the brass was found in the house of the prisoner. To prove that the brass was stolen by Edwin Smith, an examined copy of the record of his conviction was put in, and by that it appeared that he had pleaded guilty.

Ludlow, Serjt., and *Talfourd*, for the prisoner. This is a judgment against the principal by confession. Now, the accessory is not bound, even by a verdict against the principal, and still less is he bound by a confession. There is no evidence of the guilt of the principal, except his own confession, which is not evidence against the accessory; and, with respect to the count which charges that the brass was stolen by a person unknown, that must fail, because the principal is known. There is another objection, which is this, the stealing of this brass is not a felony. By the stat. 7 & 8 Geo. 4, c. 29, s. 44, it is enacted, that if any person shall steal, &c., any brass, &c., fixed for a fence, "to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony." The prosecutor relies on the words, "place dedicated to public use," and if this case does not come within those words, it is neither within the act of parliament, nor is it the offence charged by this indictment. The word "place," in the statute, being joined with the words, square and street, must clearly mean a place *ejusdem generis*, and not a church-yard. [*378]

Mr. Justice BOSANQUET. There is no doubt that the accessory may controvert the guilt of the principal; but I take it, that whatever is evidence against the principal, is *primâ facie* evidence of the principal felony, as against the accessory; and if the principal is convicted on his own confession, that is *primâ facie* evidence of his guilt as against the accessory, but not conclusive. If this objection were valid, it would set up the last count of the indictment, because, if this is not evidence as to the person who stole the brass, there is no evidence to show who did it. Though, I agree that, if an offence is charged to have been com-

mitted by a person unknown as principal, and it appear that he is known, the prosecution must fail. With respect to the other point—this statute, which is rather peculiarly worded, makes it an offence to steal brass fixed in any square, street, or other place, dedicated to public use or ornament; and I think that a church-yard is a place of that kind, within the meaning of this act. If the prisoner is convicted, I do not say that I will reserve the point, but I will take it into further consideration. The prisoner was acquitted on the merits.

Maclean, for the prosecution.

Ludlow, Serjt., and *Talfourd*, for the prisoner.

[Attorneys— —, and *Housman*.]

By the stat. 7 & 8 Geo. 4, c. 29, s. 44, it is enacted—"That, if any person shall steal or rip, cut or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or *to any building whatsoever, or *379] anything made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person."

REX v. STONE and Others. August 27.

If, in an indictment for compounding felony, it be averred that the defendant did desist, and from that time hitherto hath desisted from all further prosecution; and it appear, that after the alleged compounding, he prosecuted the offender to conviction, the Judge will direct an acquittal.

INDICTMENT for compounding a felony. The indictment stated, that Selina Smart had stolen various articles (which were enumerated) from the defendant Stone, and that he and the other two defendants did compound the said felony with S. S., and did take, exact, and receive from S. S., a sum of 6*l.* 16*s.*, for compounding the same; and that the defendants "did desist, and from that time hitherto have desisted, from all further prosecution of the said S. S., for the felony aforesaid."

Justice, for the prosecution, opened—That Selina Smart and her sister had been in the service of the defendant Stone, who found in their possession some articles that he claimed to be his; that the defendant Stone charged them with stealing those articles, and, having paid Selina Smart a sum of 6*l.* 16*s.*, which was the amount of her wages, he left the room, telling the other defendants to settle with Selina Smart and her sister; and that the other defendants then told Selina Smart and her sister, that they would be both transported if they did not go away and leave the money; that they accordingly did leave the money, and afterwards went before a magistrate to try to recover their wages; but these circumstances coming to the knowledge of the defendant Stone, he preferred an indictment *380] against Selina Smart and her sister, for robbing him; upon which indictment they were convicted.

Mr. Justice BOSANQUET. The present indictment charges, that the defendants compounded a felony, and "did desist and from that time hitherto have desisted from all further prosecution of the said Selina Smart." Now, I understand you to state, that, so far from that being the case, Selina Smart has been actually convicted on the prosecution of this very defendant.

Carrington, for the defendants. Both Selina Smart and her sister were tried at the last Assizes, before Mr. Baron Bolland, and convicted.

Mr. Justice BOSANQUET. Then, I am of opinion, that this case cannot be supported. The defendants must be acquitted. Verdict—Not guilty.

Justice, for the prosecution.

Carrington, for the defence.

[Attorneys—*Harmer*, jun., and *H. Powell*.]

In some of the precedents, the allegation that the party has not prosecuted the offender, is omitted, but it may be a question, whether an indictment so framed would be good; because the offence against the public is not the taking of money from a thief, but the letting such thief escape without punishment. Indeed, if this allegation had been mere surplusage, and put in as a matter of aggravation, as is sometimes done in indictments for misdemeanor, the learned Judge would not have stopped the case on this objection.

*GLOUCESTER CITY ASSIZES.

[*381]

BEFORE MR. JUSTICE PARK.

REX v. WOOD and Another. August 26.

Breaking a person's collar bone, and bruising him, is not a wounding within the stat. 9 Geo. 4, c. 31, s. 12.

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 12, (a) for feloniously and maliciously wounding Decimus Best, with a hammer, with intent to murder him. There were other counts, laying the intent to be—to disable him, to do him some grievous bodily harm, &c.

The prosecutor stated, that hearing cries of murder, he went to the house where the prisoners were, and that they struck him repeatedly with a hammer, and an iron instrument, called a sticking bar, which is used in the pin trade. He further stated, that his collar bone was broken, and *the ends of that bone injured, that his back and loins were bruised tremendously, and his head was very sore. [*382]

Watson, for the prisoner, submitted that this was not a wounding, as the skin was not broken.

Mr. Justice PARK allowed the case to go to the Jury, who convicted both the prisoners; and his Lordship reserved the point for the opinion of the Judges.

Justice, for the prosecution.

Watson, for the prisoners.

[Attorneys—*Dance*, and *Tipton*.]

In the ensuing term, it was decided by the Judges, that this was not a wounding (b) within this act.

(a) By the stat. 9 Geo. 4, c. 31, s. 12, it is enacted—"That, if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony; and, being convicted thereof, shall suffer death as a felon: Provided always, that in case it shall appear, on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances, that, if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony."

(b) Dr. Johnson, in his Dictionary, defines a wound to be, "a hurt by violence," but, among medical men, the term wound is used in a much more limited sense.

Mr. Cooper, in his Dictionary of Surgery, tit. "Wound," says, "a wound may be defined to be a recent solution of continuity in the soft parts, suddenly occasioned by external causes, and generally attended at first with hemorrhage."

*383] •NORFOLK SUMMER CIRCUIT. 1830.

BEFORE MR. JUSTICE LITLEDALE, AND MR. JUSTICE J. PARKE.

BUCKINGHAM ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

WHITAMORE v. WATERHOUSE and Others. July 20.

In an action on the case against stage coach proprietors for an injury done by the mismanagement of the coach, whereby a person was struck by the luggage on the coach; the guard of the coach is not a competent witness for the defendants, without a release; but a release given by one of the defendants is sufficient.

Semble, that in such an action the proprietors and the coachman may be sued jointly.

CASE against fourteen defendants, thirteen of whom were proprietors, and the fourteenth the coachman of the Manchester Defiance coach, to recover damages for an injury received by the plaintiff from the defendants' coach. The first count of the declaration stated, that the plaintiff was possessed of a horse, which he was riding along a public highway, and that the "said defendants were then and there possessed of a coach and certain horses, drawing the same, and which said coach and horses were then and there under the care and management of the said defendants," who were driving the same along the highway. "Nevertheless, the said defendants then and there so carelessly, improperly, and negligently conducted themselves, in and about the driving, directing, and managing, the said coach and horses, that, by and through the negligence and improper conduct of the said defendants, the said coach and horses were then *384] and there, with great *force and violence, driven and ran towards and against the said plaintiff and his said horse; and certain luggage then and there upon and attached to the said coach, then and there struck against the said plaintiff and his said horse, and threw the said plaintiff down," &c. The second count stated, that the plaintiff was possessed of a horse, and was riding, &c., and that all the defendants were possessed of a coach and horses, "which said last-mentioned coach and horses were then and there under the care and management of the said defendant, John Emerson, as the servant and agent of and for the said other defendants; and which said defendant, J. E., was then and there, as such servant and agent as aforesaid, driving the said last-mentioned coach and horses in and along the said highway, to wit, in the county aforesaid." "Nevertheless, the said defendants so carelessly, improperly, and negligently conducted themselves in and about the driving, directing, and managing the said coach and horses, that, by and through the carelessness, negligence, and improper conduct of the said defendants in that behalf, the said coach then and there ran and struck with great force and violence against the said plaintiff and his horse," &c.

Kelly, for the defendants, submitted, that the plaintiff's counsel must elect either to proceed against the coachman or the proprietors; they could not proceed against both.

Mr. Justice J. PARKE. I never saw a case before in which the proprietors and coachman were joined.

Storks, Serjt., and *Gunning*, for the plaintiff, cited the case of *Michel v. Alestree*. (a)

(a) 2 Lev. 172. This was an action on the case against a master and servant, for an acci-

*Mr. Justice J. PARKE. I think, upon the authority of that case, I cannot call upon the plaintiff to discharge either the proprietors or the coachman. The question will be hereafter open in arrest of judgment. [*385]

Upon this, *Storks*, Serjt., for the plaintiff, consented to the acquittal of the coachman.

For the defence, the guard of the coach was called.

Storks, Serjt., objected to his being examined without a release, as he was so mixed up in the transaction, as to be probably liable.

Mr. Justice J. PARKE. You must release him.

Kelly, for the defendants. We have not fourteen defendants here to execute a release.

Mr. Justice J. PARKE. One will do.

The guard was not examined.

Verdict for the defendants.

Storks, Serjt., and *Gunning*, for the plaintiff.

Kelly, for the defendants.

[Attorneys—*Pearse*, and *Leigh*.]

dent caused by the driving of ungovernable horses in Lincoln's-inn-fields; the master was not present at the accident, but the plaintiff recovered against both.

*BEDFORD ASSIZES.

[*386]

BEFORE MR. JUSTICE LITLEDALE.

REX v. BIRDSEYE. July 24.

A prisoner was indicted for stealing three articles. It appeared, that, having taken the first article, he returned in about two minutes and took the second, and then returned in half an hour and took the third:—Held, that the last taking was a distinct felony, and could not be given in evidence with the other two. But, that the interval of time between the first and second takings was so short, that they must be considered as parts of the same transaction.

INDICTMENT for stealing pickled pork, a bowl, some knives, and a loaf of bread.

It appeared, that the prisoner entered the shop of the prosecutor, and ran away with the pork. In about two minutes he returned, replaced the pork in a bowl, which contained the knives, and took away the whole together, threatening destruction to any one who followed him. In about half an hour after, he came back to the prosecutor's shop, and took away the loaf.

Mr. Justice LITLEDALE. This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork, and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction, but I think that half an hour is too long a period to admit of that construction. The taking of the loaf, therefore, is a distinct offence.

The prisoner was acquitted, the learned Judge telling the Jury, that the felonious intent was not sufficiently made out.

Smith, for the prosecution.

[Attorney—*Eagles*.]

*387] *REX v. HANNAH KINGSTON. July 26.

A girl was charged with administering poison, with intent to murder. The surgeon said to her, "you are under suspicion of this, and you had better tell all you know." After this she made a statement to the surgeon:—Held, that that statement was not admissible in evidence.

INDICTMENT for administering arsenic to Eliza Bates, with intent to murder her. It appeared, that the surgeon who was called in saw the prisoner, and said to her, you are under suspicion of this, and you had better tell all you know; and after this she made a statement to the surgeon.

Mr. Justice J. PARKE, having conferred with Mr. Justice LITLEDALE, held, that evidence of this statement was inadmissible. Verdict—Not guilty.

Hunt, for the prosecution.

Storks, Serjt., for the prisoner.

See the cases referred to, Carr. Supp. 58; and the case of *Rex v. Clewes*, ante, p. 231.

CAMBRIDGE ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

REX v. GEORGE BRIGHT. July 27.

A. went to a house at night, demanding to see the servant. He was told to depart, and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived, A. said, that if a light appeared at the windows he would break them; upon which the constable took him into custody:—Held, that the constable was not justified in so doing.

INDICTMENT for stabbing Thomas Sell, with intent to murder him. The indictment also contained a count, charging the intent to be, to resist the prisoner's lawful apprehension.

*388] *It appeared, that the prisoner, on the 2d of July, at about half-past ten o'clock at night, came to the house of a person named Hagger, and demanded to see the maid servant. Mrs. Hagger desired him to quit the house, which he refused to do, and the prosecutor, who was a constable, was sent for. Before the prosecutor came, the prisoner left the house, and went into the garden. In about twenty minutes the prosecutor came. The prisoner did nothing in his presence; but, upon the prisoner saying, "if a light appear at the windows, I will break every one of them," the prosecutor took him into custody; and the prosecutor and others then confined his hands with a cord; the prisoner borrowed a knife to cut the cord, and, in endeavouring to cut it, wounded the prosecutor.

Smith, for the prisoner, submitted, that the arresting the prisoner was illegal, as nothing had been done by him in breach of the peace in presence of the constable.

Mr. Justice J. PARKE. I think that the detention of the prisoner, by the prosecutor, was illegal. There was no breach of the peace when the prisoner was taken into custody. If death had ensued from the prisoner's resistance, it would not have been murder, but manslaughter. Something had certainly taken place previously to the arrival of the constable; but still, when he did arrive, he had no charge given him to take the prisoner. Verdict—Not guilty.

Hunt, for the prosecution.

Smith, for the prisoner.

[Attorney for the prosecution—*Chevell*.]

*NORWICH ASSIZES.

[*389]

BEFORE MR. JUSTICE LITLEDALE.

WRIGHT v. WRIGHT. August 4.

Where, on the trial of an issue out of the Court of Chancery, a person who is not a party on the record is, by order of that Court, "to be at liberty to attend the trial of such issue;" the counsel of such person has no right to address the Jury, or to call witnesses; but he may cross-examine the witnesses called by both parties, and suggest points of law.

ISSUE directed by the Court of Chancery to try the validity of a will. Under the order of the Court of Chancery, Henry Wright, one of the legatees, was "to be at liberty to attend the trial of such issue."

After *Storks*, Serjt., had addressed the Jury for the defendant, *Prendergast*, as the counsel of Henry Wright, claimed a right to address the Jury for his client.

Storks, Serjt., objected to this, and cited the case of Sir Gregory Page Turner, in which Firth, Serjt., held a brief "to attend," and in which Best, C. J., decided, that he had no right to address the Jury or call witnesses.

Mr. Justice LITLEDALE having conferred with Mr. Justice J. Parke, decided, that *Prendergast* had no right to address the Jury, or to call witnesses; but that he might cross-examine the witnesses of both parties, and suggest points of law.

Special verdict.

Andrews, and *Austin*, for the plaintiff.

Storks, Serjt., and *Kelly*, for the defendant.

Prendergast, for one of the legatees.

[Attorneys—*Saunders & Comyn*—*Bridges*—*Ager & Bircham*.]

*CROWN SIDE.

[*390]

BEFORE MR. JUSTICE J. PARKE.

REX v. SNOWLEY.

Embezzlement. A. was employed to lead a stallion, and he was to charge 30s. a mare, and not take less than 20s. He received a sum of 6s. for the covering of a mare which he did not account for—Held, no embezzlement, as this sum was not received "by virtue of his employment."

EMBEZZLEMENT. It appeared, that the prisoner was hired by the prosecutor to lead a stallion round the country during the season, and he was to charge for each mare, 30s., and not to take less than 20s. He stated, that his account contained every sum due to his master; but it was proved, that a sum of 6s., which was the whole charge he had made for covering one mare, was not included in his account.

Mr. Justice J. PARKE (having conferred with Mr. Justice LITLEDALE). This is not an embezzlement. To constitute a embezzlement, the prisoner must have received the money by virtue of his employment; and as it was his duty to take 30s., and not less than 20s., this sum of 6s. was not received by him by virtue of his employment. He must, therefore, be acquitted.

Verdict—Not guilty.

Rising, for the prosecution.

Palmer, for the prisoner.

[Attorneys—*Clowes*, and *Palmer*.]

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*REX v. WYMER.

A box belonging to a Benefit Society was stolen from a room in a public-house. Two of the stewards had keys of this box; and, by the rules of the society, the landlord ought to have had a key, but in fact he had not:—Held, that the prisoner might be convicted on a count laying the property in the landlord alone.

INDICTMENT for burglary, and stealing the box of a benefit society. All the counts in the indictment, except one, laid the property to be in one of the stewards; and that one in the landlord of the public-house where it was kept. It appeared that there were four stewards of the Society, and that, by the rules, the landlord ought to have had a key of the box, but in fact he had none. The box was deposited in a room in the public-house, and two of the stewards had each a key.

Mr. Justice J. PARKE intimated, that the case must rest on the count which stated the property to be in the landlord.

Palmer, for the prisoner, contended, that if there was any property in the landlord, it was a joint property between him and the stewards.

Mr. Justice J. PARKE. I am of opinion that there is sufficient evidence to go to the Jury of the property being in the landlord alone. Verdict—Guilty.

Palmer, for the prisoner.

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*OLD BAILEY SESSION. 1830.

BEFORE MR. BARON GARROW, AND MR. JUSTICE J. PARKE.

REX v. BISPHAM. July 10.

It is not essential that witnesses who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character and conduct, as enables them conscientiously to say that it is impossible to place any reliance on any statement that such person may make.

INDICTMENT, charging the prisoner with forging a plate stamp.

A witness, named Neale, was called on the part of the prosecution, and his evidence made out nearly all the important parts of the case.

For the defence, a witness was called, who stated, that he had known Neale for three years, and would not believe him on his oath.

Brodrick, for the prosecution, asked the witness if he had ever known of Neale's being examined on oath; and he admitted that he had not.

GARROW, B. You have known him three years; have you such a knowledge of his general character and conduct, that you can conscientiously say, that, from what you know of him, it is impossible to place the least reliance on the truth of any statement that he may make?

The witness answered in the affirmative

GARROW, B. (in summing up). With respect to the credit that you ought

to give to the testimony of the witness *Neale, a person has been called on the part of the prisoner, who has told you that he would not believe Neale on his oath. That person was asked by the learned counsel for the prosecution, whether he had ever heard Neale examined on his oath. Now, that is not the criterion; for, if the question, whether a witness was to be believed on his oath depended on whether other persons had heard him examined, that class of evidence would always be inapplicable where the witness to be discredited had never been examined before. Every one must be examined for the first time on some occasion or other; and were that criterion admitted, every man, no matter how infamous, would be allowed to walk over the course once, merely because nobody had ever heard him examined before. I take it, that, without ever having been examined on oath, a man may have been guilty of such immoral and profligate conduct for a length of time, as to convince respectable persons that his statements are wholly unworthy of belief. The question therefore really amounts to this, has the witness such a want of moral character, that other persons cannot trust to a word that he says. Verdict—Not guilty.

Gurney, Brodrick, and R. Scarlett, for the prosecution.

C. Phillips, for the prisoner.

[Attorneys—*Timms, and Humphreys.*]

*SPECIAL COMMISSION AT THE OLD BAILEY. [394]

BEFORE MR. JUSTICE BAYLEY, MR. JUSTICE BOSANQUET, AND NEWMAN KNOWLYS, ESQ., RECORDER.

REX v. HELSHAM. Oct. 7.

In an indictment for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his Majesty. To prove the allegation that the prisoner was a subject of his Majesty, his own declaration is evidence to go to the Jury, and it will be for them to say, whether they are satisfied that he is in fact a British born subject.

A bill of indictment for this offence ought not to state it to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-bow, &c.," and it being so stated, the Court directed the London venue to be struck out before the bill was found by the Grand Jury.

In a duel fought at Boulogne in France, Lieutenant Joseph Crowther had been killed by Captain Hesham on the 1st of April, 1829; and the latter had been committed to Newgate by Mr. Minshall, a magistrate of Bow street, under the stat. 9 Geo. 4, c. 81, s. 7; but was afterwards admitted to bail by Lord Tenterden, C. J.

A special commission issued for the trial of Captain Hesham; and, in pursuance of it, a precept was issued, directing the sheriffs of London to summon a grand and petty jury.

Bayley, J., charged the Grand Jury; and a bill of indictment was presented to them, charging Captain Hesham with the murder of Lieutenant Crowther. It charged the murder to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-bow, in the ward of Cheap, &c."

The Grand Jury objected to finding the bill, as it stated the death to have occurred in two different places.

BAYLEY, J. (having conferred with Bosanquet, J., and the Recorder) directed the words, "to wit, in the parish of St. Mary-le-bow, in the ward of Cheap, in the &c.," to be struck out. His Lordship also said, that it was deemed by the Court to be necessary to have inserted in the bill, an allegation that the

prisoner and the deceased were subjects of his Majesty, and the bill must therefore be amended in this respect.

*395] *This allegation was accordingly inserted.

The Grand Jury having returned a true bill, Captain Helsham was put upon his trial, and evidence was given that Lieutenant Crowther was killed by him in a duel at Boulogne. The brother of Lieutenant Crowther proved that Lieutenant C. was an Englishman, and was born in the neighbourhood of Islington; and Mr. Maloney proved that Captain Helsham had told him that he was an Irishman, and had come from Kilkenny.

Alley, for the prisoner, contended, that, under this Act of Parliament, it was necessary to prove that the parties were natural born subjects of his Majesty. The present Act of Parliament differed much from the former statute of 33 Hen. 8, c. 23. The words of this statute were limited, those of the former statute being "any person or persons." It never could have been intended, that this act should be applied to the subjects of foreign governments who might have been domiciled in England, or who might have become naturalized either by Act of Parliament, or service to the state. Foreigners who served in the British navy for two years, and conducted themselves well, were, *ipso facto*, naturalized; but it never could have been meant, that if two officers, so naturalized, were to engage in a conflict in their own country, that they would be triable for it here as if they were natural born subjects. Now, if this were so, it was necessary to prove, by some one acquainted with the fact, where Captain Helsham was born. This might be done by calling his father or some other relation who knew the fact, the same as was done with respect to the unfortunate deceased. This was a fact which could not fall within the knowledge of Captain Helsham, as no man could know where he was born. And as the stream could be traced no higher than the fountain-head, Captain Helsham could not enable another to prove by his declarations more than he himself could have *396] *proved. It was every day's experience, that a man could not prove where he was born, even to entitle himself to parish relief; indeed, many men, from motives known to themselves, were induced to represent themselves as the subjects of a country in which they were not born; and a man might be in one sense an Englishman, that is, a naturalized or adopted Englishman, although he was not born in this country.

Adolphus, on the same side. It is manifest, that the words, "his Majesty's subjects," should be confined to persons born in this country. In the Indian empire his Majesty has millions of subjects, but it would be absurd to say, that they were to be tried here for offences wheresoever committed.

BAYLEY, J. (after consulting with Bosanquet, J., and the Recorder) held, that the declaration of Captain Helsham, unexplained, was, as against himself, evidence to go to the Jury.

Captain Helsham was therefore called on for his defence.

BAYLEY, J. (in summing up) left it to the Jury to say—

Whether they were satisfied, by the evidence, that Captain Helsham was a British born subject; for, that they must be quite satisfied that such was the fact before they could pronounce him guilty, even if they thought that the deceased came by his death at the hands of Captain Helsham.

Verdict—Not Guilty.

Gurney, C. Phillips, and Clarkson, for the prosecution.

*397] **Alley, Adolphus, and Bodkin*, for the defence.

[Attorneys—*Harmer, and J. Smith.*]

OLD BAILEY OCTOBER SESSION.

BEFORE MR. JUSTICE PARK AND MR. BARON GARROW.

REX v. STEPTOE. Oct. 29.

If a prosecutor give in evidence a declaration made by a prisoner exculpatory of himself, the jury are not bound to take this to be true, merely because the prosecutor gives it in evidence, but they ought to consider how far it is consistent with the rest of the evidence, and whether they believe it to be really true.

INDICTMENT for stealing a ram. The ram was missed on the 15th of September, and the carcass found concealed in the prisoner's bed, on the 17th. It appeared that a patrol had, at about two o'clock in the morning of the 17th, followed the prisoner's brother and another man to the prisoner's house; and that, on searching the house, he found the carcass in the bed, the prisoner being himself in bed at the time. The patrol stated, that the prisoner, when the carcass was found, said that his brother had brought it.

Mr. Justice PARK (in summing up). What a prisoner says is not to be of necessity taken as an exculpation, merely because he says it, and the prosecutor gives it in evidence. You are to take what he says all together. You are not bound to take the exculpatory part as true, merely because it is given in evidence; but you will say, looking at the whole case, whether you think the prisoner's statement consistent with the other evidence, and whether you believe that it is really true.

Verdict—Not guilty.

C. Phillips, for the prosecution.

*REX v. JOHN ST. JOHN LONG. Oct. 30.

[*398]

A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by *gross ignorance* of his art, or *gross inattention* to his patient's safety.^(a) On an indictment for manslaughter, where the death is occasioned by the application of a lotion to the skin, evidence may be given of the effect of the lotion when applied to other patients.

MANSLAUGHTER. The indictment charged, that John St. John Long, on, &c., at, &c., in and upon one Catherine Cashin, &c., did make an assault, and with a certain inflammatory and dangerous liquid, secretly prepared, mixed, and made by him, *her the said C. C.*, on the back of her the said C. C., feloniously did rub, wash, and sponge, and cause and procure to be rubbed, washed, and sponged, he the said J. St. J. L. knowing the said liquid so prepared, mixed, and made, to be inflammatory and dangerous; and that he did, by the said rubbing, &c., cause, upon the back of the said C. C., one mortal inflammation and wound of the length, &c., and did also, by means of such rubbing, &c., cause and procure the said C. C. to become mortally sick, &c. The indictment went on to state, that the deceased languished from the 3d of August to the 17th of August, 1830, and then died. There were other counts, all in nearly the same form; in some of which, the death was stated to be from the inflammation and wound; and in the others, from the sickness.^(b)

(a) *Vide* a case against the same prisoner, *post*, in which *gross rashness* in the application of a dangerous remedy, was also mentioned.

(b) In this indictment, there was no count, which expressly imputed either negligence, carelessness, ignorance, or want of skill to Mr. Long, which perhaps there should have been; nor was there any count charging the inhaling to have been the cause of the death of the deceased.

Alley, for the prosecution, in his opening, stated, that he imputed it to Mr. Long, that, by gross misconduct, he had produced an inflammation which had caused the death of Miss Catherine Cashin. The act was done by a servant of Mr. Long, by his directions; but, as the servant was only an innocent agent, Mr. Long was to be considered as the principal, exactly the same as if he had *399] done it himself. He did not impute anything to Mr. Long, on the ground of his not being a regular medical practitioner. There was a dictum of Lord Coke (a)—

Mr. Justice PARK. That is not law.

Alley. This was set right by Lord Hale, in his Pleas of the Crown. (b) The prosecutor in this case asked for judgment against Mr. Long, on the broad principle that he was no more responsible than the first medical practitioner in the kingdom; but still, if any man, by an unlawful act, should cause death, it was manslaughter. This was distinctly laid down by Mr. Justice Foster, (c) who said—"If an action, unlawful in itself, be done deliberately, or with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder; but if such mischievous intention does not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

There was also another proposition of law, which was, that if, in the prosecution of any lawful act, anything were done which was imprudent, irregular, or improper, and death ensued, it would be manslaughter; and it was laid down by Mr. Justice Foster, (d) that—"It is not sufficient that the act upon which death ensue be lawful or innocent, it must be done in a proper manner, and with due caution to prevent mischief." The most common case of this kind was that of a coachman driving fast in the streets. He had no bad intent, but the act being done with irregularity, he would be guilty of *400] manslaughter if death ensued. To apply this principle to the cases of medical men, it would stand thus: they, whatever their skill, must use due caution; but there was no doubt that considerable latitude must be allowed them. In modern times, poisons were exhibited as medicines in certain cases; but if, in the hurry of the moment, the medical man were to give fifty grains instead of one, he would be guilty of manslaughter, if death ensued. So, a surgeon had a right to amputate a limb; but if, in a hurry to go elsewhere, he left the arteries imperfectly secured, and death ensued, he would also be guilty of manslaughter. It might be said, that, in this case, the consent of Miss Cashin was given to all that was done; but still, no one could permit another to do that which was criminal. Persons could not give a consent to put their own lives in danger.

It appeared, from the evidence of Mr. Sweetman, that two of the family of Mrs. Cashin had died of consumption; but that Miss Cashin, who was twenty-four years of age, had enjoyed good health; and that Mr. Long told him, that he (Mr. L.) had informed a young lady, that, unless Miss Cashin put herself under his care, she would die of consumption in two or three months; and that, on this being communicated to Mrs. Cashin, she placed her daughter under Mr. Long's course of treatment, hoping to prevent her having a consumption. Mr. Sweetman also stated, that Mr. Long told him that he rubbed a mixture on different parts of the bodies of his patients, and that this had been applied to Miss Cashin. It was proved, by Mrs. Roddis, who was also a witness for the prosecution, that she, on Friday the 13th of August, went with Miss Cashin to Mr. Long's, respecting a wound on her back, and that Miss Cashin then inhaled;

(a) 4 Inst. 251, referred to, 3 C. & P. 630.

(b) See this passage, 3 C. & P. 629.

(c) Fos. Cr. L. p. 261.

(d) Fos. Cr. L. p. 262.

and that, on the next day, Mr. Long examined Miss Cashin's back, and said it was in a beautiful state, and that he would give one hundred guineas if he could produce a similar wound on the persons of some of his patients. Mrs. Roddis stated, that she directed Mr. Long's attention to *a part of the [*401] wound which was of a darker appearance, and that he stated that this proceeded from the inhaling; and that, unless those consequences were produced, he could expect no beneficial result. The wound, at this time, was about five or six inches square. Mrs. Roddis further stated, that Miss Cashin was suffering much from sickness, and that she mentioned this to Mr. Long, who said, that it was of no consequence, but, on the contrary, a benefit; and that those symptoms, combined with the wound, were a proof that his system was taking due effect; and that, on Sunday the 15th, Miss Cashin having got worse, Mr. Long said, that in two or three days, she would be in better health than she had ever been in her life, and spoke very confidently that the result of his system would be to prolong her life; and that no person could be doing better than Miss Cashin was. At this interview Mrs. Roddis showed Mr. Long the wound on Miss Cashin's back, which had extended. Mrs. Roddis also stated, that Mr. Long, on Sunday the 15th, was desired to do something to stop the sickness of Miss Cashin, but that he said he had a remedy in his pocket, which he would not apply, as he knew that sickness had been beneficial; and he also stated on that day, and on Monday the 16th, that Miss Cashin was doing uncommonly well. On Tuesday the 17th, she died.

It was proved by Mr. Brodie, the surgeon, that he saw Miss Cashin on Monday the 18th, and that her back was extensively inflamed, as large as a plate; and that, in the centre, was a spot as large as the palm of his hand, black and dead, which was in a sloughing or mortified state. Mr. Brodie stated, that he did not consider Miss Cashin to be in any immediate danger, and that he thought that some very powerfully stimulating liniment had been applied to her back. In his cross-examination he said, that it was very common to produce a counter irritation, and that the things used to make that, produce different effects on different constitutions; but, in re-examination, he *stated that applying [*402] a lotion of a strength capable of causing the appearances he saw, to a person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. Mr. Brodie also stated, that the appearances on Miss Cashin's back were quite sufficient to account for her death. Several medical men, who had examined the body of the deceased, stated, that, on the most careful examination, they could not discover any latent disease, or seeds of disease. A servant of Mr. Long, named Ann Dyke, proved, that, on the 3d of August, she, by the direction of Mr. Long, rubbed Miss Cashin's back with a liquid, but that she did not know what that liquid was. In her cross-examination, she stated, that Mr. Long had a great many patients, many of them persons of rank, and that she rubbed Miss Cashin with the same liquid that was used for the other patients.

Gurney, for the defence, proposed to ask whether a greater effect was produced on Miss Cashin, than on other persons.

Alley, for the prosecution, objected that this was not evidence; for, that unless the liquid was the same, and the person in the same state of constitution, it amounted to nothing.

Gurney. Nothing is more clear than that this is an unobjectionable question. A person is charged with doing something which has done mischief. Now, if I show that the same thing was applied to other persons, and show the effects of it, it will turn out, that what was the medicine of health to one, was the medicine of disease to another. I shall show that the same thing was used, and shall call the other persons to prove that it had a good effect upon them.

*Alley, *contra*. The single question is, whether Mr. Long has committed an offence, with respect to this young woman. It is not in issue [*403] whether he has done good or not in other cases. See the extent to which this would go. If he had ten thousand patients dead, could I call their friends to

prove that they died under his hands? If I could not, he cannot call other patients on the other side; and besides, we can have no insight of what was done by him towards his other patients.

Mr. Justice PARK, and Mr. Baron GARROW, held, that the question might be put, and that the witness might be asked the names of the persons who attended at the same time, and were treated in the same manner as Miss Cashin.

The witness stated, that the Marchioness of Ormond and Lady Harriet Butler were at Mr. Long's at the same time as Miss Cashin; and that the same lotion was applied to them, and also to Mrs. Ottley, and many others.

Gurney, Andrews, Serjt., and Adolphus, for the defence, submitted, that, in point of law, this was nothing like a case of manslaughter; and they cited and relied on 1 Hale's P. C. 429, cited 3 C. & P. 629, 4 Bl. Com. b. 4, c. 14, cited 3 C. & P. 629, and *Rex v. Van Butchell*, 3 C. & P. 629; and argued, that it was quite clear that Mr. Long intended to prevent or cure disease.

Mr. Justice PARK. I am in this difficulty. I have an opinion, and my learned brother differs from me. I must therefore let the case go to the Jury.

Mr. Baron GARROW. In *Rex v. Van Butchell*, the learned Judge had very good ground to stop the case, as there was no evidence as to what had been *404] done. *I make no distinction between the case of a person who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the president of the College of Physicians, the president of the College of Surgeons, or the humblest bone-setter of the village; but, be it one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages? because the parties are bound to have skill, care, and caution. I am of opinion, that, if a person who has ever so much or so little skill sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? because I have a right to have reasonable care and caution.

Alley. There was a case on the Northern Circuit, where a man, who was drunk, went and delivered a woman, who, by his mismanagement, died; and he was sentenced to six months' imprisonment.

For the defence, twenty-nine witnesses were called, including the Marchioness of Ormond and Mrs. Ottley, who stated that they had been patients of Mr. Long, and that they were satisfied with his skill and diligence. One of the witnesses said, that he should never cease to pray for Mr. Long as long as he lived. Another (a lady) said, that she could never be sufficiently thankful to him for what he had done for her family. And another was a surgeon, who had lived in Jamaica for thirty-six years, and he expressed himself perfectly satisfied with Mr. Long's treatment and conduct.

Mr. Justice PARK, in summing up. The learned counsel for the prosecution *405] truly stated, in the outset, that, *whether the party be licensed or unlicensed is of no consequence, except in this respect, that he may be subject to pecuniary penalties for acting contrary to charters or acts of parliament. But it cannot affect him here. For this I have the authority of that great and eminent person, Lord Chief Justice Hale, who has expressly said, that, though physicians and surgeons, if they are not licensed, may be subject to penalties, yet they are not answerable criminally on that account. His phrase is, "God forbid that any mischance of this kind should make a person guilty of murder or manslaughter." And, therefore, licensed or unlicensed, certainly does not signify. I agree with my learned brother, that what is called *mala praxis* in a medical person, is a misdemeanor; but that depends upon whether the practice he has used is so bad that everybody will see that it is *mala praxis*. The case at Lancaster differs from this case. I have communicated with Lord Chief Justice Tindal, who tried that case, and he informed me that the man was a blacksmith, and was drunk, and was so completely ignorant of the proper steps, that he totally

neglected what was absolutely necessary after the birth of the child. That certainly was one of the most outrageous cases that ever came into a Court of Justice. I would rather use the words of my Lord Ellenborough in the case of *Rex v. Williamson*. He says, "That a medical man is not to be charged with manslaughter unless he has been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention." And this is important here; for, though he be not licensed, yet experience may teach a man sufficient; and the question for you will, by and by, be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention. The case quoted from the Institutes of Lord Coke, who lived upwards of 200 years ago, occurred at a time when there were very few cases of the kind, and was deemed to be a case of manslaughter. But I do not *derogate from his high and illustrious character, when, as far as criminal law is concerned, I set against it the [*406] authority of my Lord Chief Justice Hale, on whom, when authority is quoted, reliance is always placed. He says, "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a chirurgion." And he quotes the Year Book, 3 Edw. 3. And he goes on to say, "And I hold their opinion to be erroneous," (evidently alluding to my Lord Coke,) "who think if he be no licensed chirurgion or physician that occasioneth this mischance, that then it is felony; for, phisic and salves were before licensed physicians and chirurgions." And he proceeds further, and says, "These opinions may serve to caution ignorant people not to be too busy in this kind with tampering with phisic, but are no safe rules for a Judge or Jury to go by." I say the same, that the public weal is deeply interested in preventing ignorant persons from tampering with these subjects. It is true, his next reason, about the want of surgeons in the country, does not apply here; because, in London, all persons can obtain the assistance of the best men, however poor they are. The question is, whether there was gross ignorance in this gentleman, or scandalous inattention in his treatment of this lady. The opinion of Lord Chief Justice Hale is recorded and adopted in Sir Edward East's Pleas of the Crown, and in Mr. Justice Blackstone's Commentaries. I come now to the case of *Van Butchell*, decided here only twelve months ago by Mr. Baron Hullock, of whom, it may be said, that a sounder lawyer or a stronger headed man never was known in the profession. I quote this case rather to show you what that learned person's strong opinion was upon the general question, on the danger, not of punishing the man found guilty of gross negligence, but whether his practice can be questioned whenever an operation happens to fail. He *says, "It is my opinion, that it makes no difference whether the party be a regular or an irregular surgeon." And [*407] also, "There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred." I agree with him that there may be such cases as those he has first mentioned; and you will have to decide, by and by, whether this case is one of them or not. I wish also to state to you what Lord Ellenborough said in the case of *The King v. Williamson*, which was the case of a man who acted as a man-midwife. [His Lordship here read the case as reported 3 C. & P. 635, (a) and observed:]

(a) We are informed by Mr. Alley, who was of counsel in that case, that, in addition to the facts stated in the report, it was proved that the prisoner had attended the deceased in seven previous confinements with perfect success, and that the deceased wished him to attend her.

In the case of *Rex v. Nancy Simpson*, reported in Willcock on the Laws relating to the Medical Profession, Append. 227, the prisoner was indicted for manslaughter. It appeared that the deceased, a sailor, had been discharged from the Liverpool Infirmary as cured, after undergoing salivation, and that he was recommended by another patient to go to the prisoner for an emetic, to get the mercury out of his bones. The prisoner was an old woman, who resided at Liverpool, and occasionally dealt in medicines. She gave him a solution of white vitriol, or corrosive sublimate, one dose of which caused his death; and she said she had

*408] *Lord Ellenborough there says, that, from the evidence, it appeared that the prisoner had delivered many women at different times, and, from this, he must have had some degree of skill. He goes along with me in thinking that skill may be acquired by practice. That is my opinion here, and there are twenty-nine witnesses all speaking to the prisoner's skill in their cases. [His Lordship read the evidence, and then observed:] There is clear proof that the prisoner did the act which shortened Miss Cashin's life. But that does not prove the case, unless you think that there was gross ignorance or inattention to human life to be inferred from it. It is evident he had some information; whether he drew improper conclusions from it is not for you or me to say. It seems, from Mr. Sweetman's evidence, that the disorder had been in the family; that a son was dead, and a daughter was likely to die. The prisoner always said, that his remedy would cure consumption; and, if the disease had not been in the family, they would not have sent to him at all. The prisoner's counsel could not by law ask the defendant's witnesses any questions as to their respective disorders, and the mode of cure, as my brother and I

*409] were of opinion that it was not evidence. *All that was evidence was, that he had displayed so much skill in other cases as to show that he was not that grossly ignorant or inattentive person who could be guilty of manslaughter according to my Lord Ellenborough's opinion in the case before mentioned. The refusal by the prisoner to apply the medicine in order to stop the sickness, although he had it with him, would, in my opinion, if wickedly done, amount to murder; but he mentioned a case in which sickness had been beneficial. Undoubtedly, the result proves a very erroneous opinion on his part; and it seems singular that the restlessness and other circumstances did not awaken apprehension and call for further measures. But the question again recurs, whether this was an erroneous judgment of a person who was of general competency, though he unfortunately failed in the particular instance. It appears that he said, on examining the wound on Miss Cashin's back, that he would give 100 guineas if he could produce a similar wound in some of his patients. This seems to show his confidence in his proceedings. And there is this observation to be made of him throughout, that he seems to have been living in a fashionable part of the metropolis, and attended by right honourable persons; and it would be against his interest to act ignorantly and carelessly. It appears, with respect to Miss Cashin, that he did not go to seek her out, and this will be for you to take into your consideration. With respect to the application of the mixture, if he commanded the woman to use it, it is the same as if he used it himself. Perhaps, from the evidence, you will think that the act caused the death; but still the question recurs, as to whether it was done either from gross ignorance or criminal inattention. No one doubts Mr. Brodie's skill, but that is not quite the

received the mixture from a person who came from Ireland, and had gone back again. And in that case Mr. Justice Bayley said, "I take it to be quite clear, that, if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequence in a case where medical assistance may be obtained. If he does so, it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another." The prisoner was convicted.

In 1 Cur. Hawk. 104; it is said, "That it hath been anciently holden, that, if a person not duly authorized to be a physician or surgeon undertake a case, and the patient die under his hand, he is guilty of felony; but, inasmuch as the books wherein this opinion is holden, were written before the statute of 23 Hen. 8, c. 1, which first excluded such felonious killing as may be called wilful murder of malice *prepenſe* from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice *prepenſe* within the meaning of that statute. However, it is certainly highly rash and presumptuous for unskilful persons to undertake matters of this nature; and, indeed, the law cannot well be too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them; but surely the charitable endeavours of those gentlemen who study to qualify themselves to give advice of this kind in order to assist their poor neighbours can by no means deserve so severe a construction from their happening to fall into some mistake in their prescriptions, from which the most learned and experienced cannot always be secure."

question; it is not whether the act done is the thing that a person of Mr. Brodie's great skill would do, but whether it shows such total and gross *ignorance in the person who did it, as must necessarily produce such a result. On [*410 the one hand, we must be careful and most anxious to prevent people from tampering in physic, so as to trifle with the life of man; and, on the other hand, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case. It is God that gives, man only administers, medicine, and the medicine that the most skilful may administer may not be productive of the expected effect; but it would be a dreadful thing if a man were to be called in question criminally whenever he happened to miscarry in his practice. These are things for your consideration when you are considering whether a man is acting wickedly; for I call it acting wickedly when a man is grossly ignorant and yet affects to cure people, or when he is grossly inattentive to their safety. With respect to the evidence on the part of the prisoner, all the witnesses that he has called have spoken of him as being perfectly satisfied with his skill, attention, and behaviour in every respect. It is observable of several of them, that, after their families had been attended, they put themselves under his care, so satisfied were they with his conduct. One of them says, that he shall pray for him as long as he lives, and another, a lady, says, she can never sufficiently thank him for what he has done for her family. It is also to be remarked, that one of these witnesses is himself a surgeon, who lived for thirty-six years in a hot climate, and he expresses himself perfectly satisfied. You will take the whole case into your consideration, and if you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty; if you do not think so, then your verdict will be otherwise.

The Jury, after some deliberation, found the prisoner guilty, and he was subsequently sentenced to pay a fine of 250*l.* to the King.

**Alley*, and *C. Phillips*, for the prosecution.

Gurney, *Andrews*, Serjt., and *Adolphus*, for the prisoner.

[Attorneys—*W. Henson*, and *Carlton*.]

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OLD BAILEY SESSION, JANUARY, 1831.

BEFORE LORD CHIEF BARON ALEXANDER, MR. JUSTICE GASELEE, AND
NEWMAN KNOWLYS, ESQ., RECORDER.

MIDDLESEX CASES.

BEFORE MR. JUSTICE GASELEE.

REX v. FREDERICK SMITH. Jan. 8.

Seemle, that on an indictment for uttering a bill of exchange with a forged acceptance, knowing the acceptance to be forged, other forged bills of exchange *precisely similar*, passed to the prosecutor by the prisoner, may be given in evidence to show a guilty knowledge in the prisoner, though they were not passed till about a month after the uttering for which the prisoner is tried.

THE prisoner was indicted for forging the acceptance to a bill of exchange, and for uttering, on the 15th of May, 1830, a bill, with a forged acceptance, knowing the acceptance to be forged, &c.

The prosecutors were a Mr. West and a Mrs. Strange, who were in partnership as dealers in ivory, and the prisoner was an ivory and bone turner. It appeared, from the evidence of Mr. West, that the prisoner had been in the habit of dealing with him for two years, and that, a few days before the 15th of May, he came and said that he wanted some ivory, and looked out some to the value of 10*l.* 17*s.*, and said he should receive a bill from Messrs. Walton and Sons in a few days, and when he had got it, he would come and clear the ivory. *412] On the 15th of May he came again and brought the bill, and Mr. West gave *him the difference between the amount of it, 38*l.* 17*s.*, and the price of the ivory, together with a former debt of a few pounds. The bill was as follows:—

"London, March 1st, 1830.

"Three months after date, pay to me or my order the sum of thirty-eight pounds, seventeen shillings, for value received. FREDERICK SMITH."

Messrs. Walton & Sons,
191 Bishopsgate-street within. }

"Accepted JOHN WALTON & SONS."

It appeared from the evidence of Mr. William Walton, of the firm of John, Henry, and William Walton, toy merchants, carrying on business at 191 Bishopsgate, that the prisoner had not dealt with their house for three years previously to the 15th May, 1830; that, up to the month of March, 1830, the name of the firm was Walton & Son, at which time it was changed to John, Henry, and William Walton, and that the prisoner, at the time he dealt with their house, had acceptances of theirs in the name of Walton & Son. The witness also proved that the acceptance was not of the handwriting of any one of their firm.

Clarkson, for the prosecution, proposed to give in evidence, for the purpose of showing a guilty knowledge in the prisoner, other bills of exchange, precisely similar, with the same drawers' and acceptors' names, &c., passed by the prisoner to Mr. West, in the month of June, 1830, which bills afterwards turned out to be forgeries.

C. Phillips, for the prisoner, objected, on the ground that what occurred subsequently, could not be given in evidence to show a previous guilty knowledge.

*413] Mr. Justice GASELEE, after consulting with the Lord *Chief Baron, and referring to Russell on "Crimes and Misdemeanors," was disposed to allow the evidence to be received, but said, that he would reserve the point for the opinion of the Judges.(a)

Upon which, *Clarkson* declined to press the evidence, thinking his case sufficiently strong without it.

The bill was on a 2*s.* 6*d.* stamp, and it appeared that it ought to have been on a 3*s.* 6*d.*

C. Phillips submitted, that this objection was fatal, as the want of a proper stamp rendered the bill a nullity, and none of the parties to it were bound to pay it.

Mr. Justice GASELEE said, that the objection had been taken and overruled many times before.

(a) In the case of *Rex v. Smith*, *ante*, 2 C. & P. 633, it was held, that if there be two indictments against a prisoner for uttering *forged notes*, the uttering of the forged note, which is the subject of the second indictment, cannot be given in evidence on the trial of the first indictment, even to show a guilty knowledge in the prisoner.

In the case of *Rex v. Taverner* (Carr. Supp. p. 195), which was tried at the Old Bailey, in the year 1809, before Lord Ellenborough, Lord Chief Baron Thomson, and Mr. Justice Lawrence, the prisoner was indicted for uttering forged bank notes; and, to show a guilty knowledge, the prosecutors wished to prove the uttering of another forged note, five weeks after the uttering which was the subject of the indictment. It was objected in that case, as it was by Mr. Phillips in the principal case, that only *previous* acts could show *quo animo* the thing was done. And the three learned Judges who presided at the trial, held, "That the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or it could be shown that the notes were of the same manufacture." This latter observation seems to support the inclination of Mr. Justice Gaselee's opinion as above mentioned, because the bills of exchange tendered in evidence were offered as bills precisely similar to the bill in question, and which, therefore, might have been concocted at the same time and for the same fraudulent purpose.

*No evidence was offered in support of the count for the forgery of the acceptance; and his Lordship left it to the Jury to say whether, at the time the prisoner gave the bill to Mr. West, he knew that the acceptance was forged. And they found him guilty of the uttering, but recommended him to mercy: in which recommendation the prosecutor, Mr. West, joined.

Clarkson, for the prosecution.

C. Phillips, for the prisoner.

The prisoner was about to be removed from the bar, when *Payne*, who was for the prosecution in another case, in which a Mr. Carman was prosecutor, against the same prisoner, for a similar offence committed in the City of London, asked his Lordship whether he thought, after this conviction, that the other case should go on or not.

Mr. Justice GASELEE said, that the Court felt a difficulty in giving any opinion, it was for the parties to exercise their discretion. He added, that the Privy Council had intimated to the Judges, that, when there were two indictments against a prisoner for capital offences, it would be desirable to try him upon both, in order that his Majesty's advisers might be able to judge whether he was a proper object to receive the royal clemency. But if the prosecutor in this case wished to withdraw the charge, he would not oppose his so doing.

Payne stated, that it was the wish of the prosecutor, for whom he appeared, that the prisoner's life might be spared; and therefore, with the permission of the Court, he would willingly withdraw from the prosecution.

*The Court assented to this arrangement, and directed the prosecutor's and witnesses' recognisances to be discharged, and the expenses of the prosecution to be allowed. [415]

At the end of the Session, the prisoner received sentence of death, but execution was respite until his Majesty's pleasure should be known, and no report has as yet been made.

BEFORE NEWMAN KNOWLYS, ESQ., RECORDER.

REX v. RICHARD CARLILE. Jan. 10.

The Court of K. B. will not grant a *habeas corpus* to discharge out of custody a person who has been convicted of libel, at the commission of *oyer and terminer*, at the Old Bailey, on the ground that when the verdict was returned only one Commissioner was present instead of two, as required by law. But *quære*, whether such a circumstance may not be assigned as error.

THE defendant was indicted for a seditious libel. He appeared to defend in person, and, previous to the Jury being sworn, he stated to the Court, that, as the jurors were entire strangers to him, he wished to have an admission from them that they were not tradesmen in the employ of the Crown.

The RECORDER said, that the only way was for the defendant to make any objection, of which he was in possession, before the Jurors were sworn; the Jury were as much strangers to the Court as they were to the defendant, and the Court could not depart from the usual and uniform course on the application of the defendant or any other person.

The defendant then said that he had no objection to make, and the jurors were severally sworn.

The indictment stated, that, at the time, &c., it was *publicly rumoured, reported,*

*416] *and believed amongst the *liege subjects of our lord the King, that divers of the liege subjects of our lord the King, who were usually employed in agricultural labours, in that part of the united kingdom of Great Britain and Ireland, called England, had been and were in divers parts of England aforesaid guilty of insurrection against the laws of this realm, and had been, and were and continued to be guilty of insurrection against the laws of this realm, and had been and were and continued to be guilty of riots, routs, and unlawful assemblies, and of acts of great violence, tumult, and disorder, and of the crimes of arson, and the wilful destruction of the personal property of divers of his Majesty's subjects, to wit, at London, in the parish of Saint Mary-le-bow, in the ward of Cheap, &c. That Richard Carlile, late of London, labourer, being a wicked, and malicious, and evil-disposed person, and contriving and intending the peace of our said lord the King to disquiet and disturb, and the liege subjects of our said lord the King, and to incite and provoke to hatred and dislike of the Government and Constitution of this realm as by law established, and also to incite and provoke the said subjects to acts of insurrection, riot, tumult, and violence, and to incite, provoke, and encourage the said agricultural labourers who were so reputed and believed to be guilty of such offences as hereinbefore is mentioned, as aforesaid, to be and continue to be guilty of insurrection as aforesaid, and to commit, and continue to commit such offences as aforesaid, and to incite, provoke, and encourage the rest of his said Majesty's subjects usually employed in agricultural labours in England, to commit and be guilty of similar offences and insurrection against the laws and government of this realm, heretofore, to wit, on the 6th day of December, in the first year of the reign of our sovereign lord the now King, in London, that is to say, at the parish, &c., unlawfully, wickedly, maliciously, and seditiously did publish, and cause and procure to be published a certain false, wicked, malicious, scandalous, and seditious libel of*

*417] *and *concerning the said Government and Constitution as by law established, and of and concerning the said agricultural labourers, containing, in one part of the said libel, the false, wicked, malicious, scandalous, seditious, and libellous matter following, of and concerning the said Government and Constitution of this realm, that is to say, "A constitutional monarchy is a most ridiculous state of government, more than mimicking absolute monarchy, and perpetuating all ancient follies and abuses. Everything conspires against a King to tell him that he is something more than man, and all that sort of flattery is calculated to unman him, and make him less than man. We want no mummeries and nonsense wherewith to please savages and fools in the present day."*

And in another part of the said libel, the false, &c. "To the insurgent agricultural labourers.

"You are much to be admired for everything you are known to have done during the last month; for, as yet there is no evidence before the public that you are incendiaries or even political rebels. Much as every thoughtful man must lament the waste of property, much as the country must suffer by the burnings of farm-produce now going on, were you proved to be the incendiaries, we should defend you by saying, that you have more just and moral cause for it, than any king or faction that ever made war had for making war. In war, all destructions of property are counted lawful, upon the ground of that which is called the law of nations, yours is a state of warfare, and your ground of quarrel is the want of the necessities of life in the midst of an abundance. You see hoards of food and you are starving. You see a government rioting in every sort of luxury and wasteful expenditure; and you, ever ready to labour, cannot find one of the comforts of life. Neither your silence nor your patience has obtained for you the least respectful attention from that government. The

*418] *more tame you have grown, the more you have been *oppressed and despised, the more you have been trampled on; and it is only now that you begin to display your physical as well as your moral strength, that your cruel tyrants treat with you, and offer terms of pacification. Your demands have been, so far, moderate and just; and any attempt to stifle them, by the threat-*

ened severity of the new administration, will be so wicked as to justify your resistance even to death, and to life for life." And in another part, &c., "Mr. Carlile justified the conduct of the agricultural labourers of the disturbed counties; and, alluding to Earl Grey's threatened severity, he trusted that, if an effort were made to put down the just discontent of those starving labourers, by any other means than that of redressing their grievances, they might be able to rise in their congregated strength and put down the Earl."

The second count contained only the passage commencing with the words, "To the insurgent agricultural labourers," and charged the intent to be, to incite them to commit and perpetrate, and join and assemble together for the purpose of committing and perpetrating acts of riot, tumult, and violence, and also to commit the crime of arson, and to resist the execution of the laws, &c. The third count contained the same passage, but set out with different innuendoes.

The fourth count contained the passage commencing "A constitutional monarchy, and also the passage, "Mr. Carlile justified the conduct," &c. Plea—Not Guilty.

To prove the introductory allegation with respect to rumours of insurrection, &c., a copy of his Majesty's proclamation, printed at the king's printing office, reciting that there were such rumours, and the London Gazette, containing such proclamation, were put in; and Sir R. Birnie, the chief magistrate of Bow street, Mr. Rawlinson, a magistrate for the counties of Middlesex and Hampshire, and Mr. Twyford, a police magistrate and a magistrate for Sussex, were called as witnesses; and from *their evidence it appeared, that, previous to, and up nearly to the time at which the libel was published, it [*419 was generally reported and believed that the agricultural labourers were in a state of insurrection, destroying threshing machines, and pulling down manufactories, and causing burnings in different parts. Mr. Rawlinson and Mr. Twyford were both in disturbed districts during part of the month of November, and saw large mobs, consisting of farming labourers, some of them armed, and some not. Mr. Rawlinson said, on cross-examination, that he did not himself see any burnings, but that he saw an assembly of sixty or seventy persons enter a blacksmith's shop, and seize sledge hammers. He also said, that he did not, during the time he was in the country, see any copies of the "Political Prompter," which was the book in which the libel appeared. Mr. Twyford, on his cross-examination, said, that he had seen a mob of about 140 persons, who said that, they had got the farmers prisoners, but they were not armed; and also, that a paper, purporting to be a humble petition for an increase of wages, was carried about in a mob of about fifty persons, and presented to different persons; but the persons who presented it did not use any violence.

The defendant, in his address to the Jury (*inter alia*), contended, that prosecutions for libel containing general remarks on the Government, and the affairs of the country, and not reflecting upon individuals, were not sustainable by law, notwithstanding the *practice of the Courts* for some time past. He instanced, on this point, the case of Hampden as to ship money, and the case of Wilkes as to general warrants; and argued, that things which had long been considered legal, when they came to be solemnly considered and determined, turned out to be illegal. As to the first sentence set out in the indictment with respect to a constitutional monarchy, he said that he only meant, that, in former times, it was considered necessary to have splendour and show, in order to dazzle the multitude, *but that those days were gone, and no such [*420 things were at all wanted now. For the purpose of negating the allegation as to the rumours of insurrection, burning, &c., he proposed to read from the "Morning Chronicle," and other newspapers, respecting the state of the country, statements purporting to be written in what was called the disturbed districts.

Adolphus, for the prosecution, objected. The statements might just as well have been written in some garret in London as in the disturbed districts.

The RECORDER said, that the defendant must do what he proposed to do, by

calling a witness, and not by producing a printed paper; that paper could not prove that there were no such reports in existence.

The defendant also wished to read from the "Times" newspaper a report of a speech made by the Duke of Wellington in the House of Lords, in the latter end of November, in which he said, that, while he was in office, he had not been able to trace any of the fires which had taken place to the agricultural labourers. This also was rejected as not being evidence.

The defendant then observed upon that part of the libel which was addressed "to the insurgent agricultural labourers," and argued that a particular state of affairs would justify the use of expressions which at another time would be considered as illegal. He referred to Blackstone's "Commentaries,"^(a) and contended, from the spirit of the passages there contained, that, under special and *421] extraordinary circumstances, some departure *from the rules of general law was justifiable. He also observed upon the conduct of the labourers, whose object, he contended, was legal, viz. to increase their wages. He relied much on the evidence of Mr. Twyford as to their being unarmed, and abstaining from acts of violence.

The RECORDER, in summing up, said, that, with respect to the first count in the indictment, as it contained three distinct passages, if the Jury had any doubt as to any one of them being a libel, they might give their verdict upon some of the other counts in which the particular passages were set out separately. With respect to the object of the labourers, he observed, that, in his opinion, the raising of wages could not, in any well regulated country, be allowed to be effected by numbers congregating together, for the purpose of intimidating those who are to pay them. If the masters had congregated together for the purpose of lowering the rate of wages, it would be thought a foul conspiracy; and, on the other side, it could not be considered in any other light. Every man had a right to put a price on his own labour, but a number of men had no right to congregate together to fix the rate to be paid to every labourer; and, if the object were sought to be accomplished by terror, it was a most serious offence. One of the witnesses had said, that there were no weapons in the possession of those people; nor was it necessary that there should be, for numbers might create terror as much as weapons of violence. That witness had also said, that they had not used actual violence; nor was it necessary that they should, in order to render their assembling together unlawful. The learned Recorder then read over the evidence, and in conclusion observed—

Although you are at liberty, by the act of the 32d of his Majesty King George the Third, to give a general verdict, yet, by the same act, I am bound to give you my opinion upon the law of the case, as if it were a case of murder, or any *422] other species of offence. I have already *said, that, with respect to the first count, there may, perhaps, be some difference of opinion; but, with respect to the second, which contains only the part addressed to the agricultural labourers, I am bound in law and in conscience to tell you, and I do tell you, as solemnly as I would pronounce the last supplication on my death-bed, that the matter set out in that count is a most atrocious, a most seditious, a most scandalous, and a most dangerous libel, calculated to encourage his Majesty's subjects, who were then, as the libel states, in actual insurrection, to continue in that state. This must be the tendency of it.

The Jury retired for some time, and afterwards returned a verdict, finding the defendant guilty upon the second and third counts; and he was, at the close of the Session, sentenced to pay a fine of 200*l.* to the King—to be imprisoned for two years in the House of Correction in Giltspur street, and, at the expiration of that period, to give security for his good behaviour for ten years, himself in 500*l.*, and two sureties in 250*l.* each; and to be further imprisoned until such security should be given, and such fine paid.

(a) Book 1, c. 16, pp. 243, 244, commencing with the words, "next as to cases of ordinary public oppressions," and ending with the words, "the prudence of the times must provide new remedies upon new emergencies."

Adolphus, Wightman, and R. Gurney, for the prosecution
 The defendant in person.

Jan. 29. In the course of Hilary Term, *Evans* applied to the Court of King's Bench for a writ of *Habeas Corpus*, to discharge the defendant out of custody, on the ground that, when the verdict of the Jury was returned, only one Commissioner was present instead of two, as required by law in the commission of Oyer and Terminer. The Court, in the absence of any precedent upon the subject, refused to grant the writ of *Habeas Corpus*, but suggested, that the objection might, perhaps, be taken advantage of on a writ of error.

***OLD BAILEY FEBRUARY SESSION, 1831. [*423]**

BEFORE MR. BARON BAYLEY, MR. BARON BOLLAND, AND MR. JUSTICE BOSANQUET.

REX v. JOHN ST. JOHN LONG. Feb. 19.

Where a person, undertaking the cure of a disease (whether he has received a medical education or not), is guilty of *gross negligence* in attending his patient after he has applied a remedy, or of *gross rashness* in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter.

MANSLAUGHTER. The first count of the indictment stated that the prisoner, on the 6th of October, and on divers other days and times between that day and the 12th of October, *feloniously* did assault Colin Campbell Lloyd, the wife of Edward Lloyd, and that he, on the said day and the said other days and times, *feloniously* did cause and procure the said Colin Campbell Lloyd to inhale certain noxious and injurious vapours, and that he, with a certain corrosive, inflammatory, and dangerous liquid, *secretly prepared*, mixed, and made by him, *feloniously* did rub, wash, and sponge, and cause and procure to be rubbed, washed, and sponged, the breast and chest of the said Colin Campbell Lloyd, and by such rubbing, washing, and sponging, and causing and procuring to be rubbed, washed, and sponged, the breast and chest of the said Colin Campbell Lloyd with the corrosive, inflammatory, and dangerous liquid aforesaid, *feloniously* did make and produce, and cause to be made and produced, one mortal sore and ulcer in and upon her breast and chest, of the length of sixteen inches, of the width of nine inches, and of the depth of two inches; and that he, by such causing and procuring the said Colin Campbell Lloyd to inhale the said noxious and injurious vapours, *feloniously* did cause and procure the said Colin Campbell Lloyd to become mortally sick and diseased in her body; of which said mortal sore and ulcer, and mortal sickness and disease of her body, the said Colin Campbell Lloyd, from the said 6th of *October until the 8th of [424 November, did languish, and languishing did live, and then, on the 8th of November, as well of the mortal sore and ulcer as also of the mortal sickness and disease of her body aforesaid, did die; and that he the said Colin Campbell Lloyd in manner aforesaid *feloniously* did kill and slay.

The 2d count charged only the rubbing, omitting the inhaling.

The 3d and 4th counts omitted the assault, and added the word "wound" after sore and ulcer.

The 5th, 6th, 7th, and 8th counts only slightly varied the statement of the manner in which the liquid was applied.

The 9th count contained an allegation, that the prisoner applied the liquid to

the chest, he *well knowing the said liquid to be inflammatory and dangerous in that behalf;*" and described the chest as becoming "*mortally inflamed, ulcerated, and gangrened all over the same.*" The 10th count was similar, only omitting the *scienter*. Plea—Not guilty.

Denman, A. G., in opening the case for the prosecution, stated, that he should not offer any particular evidence as to the inhaling, as it did not appear, as far as they were able to judge, to be in any way the cause of the death, which appeared to be solely occasioned by the application of the mixture. If the facts were made out, the question would arise whether the prisoner was guilty of manslaughter. The charge against him was not of acting with malice aforethought, but of applying himself to the treatment of a case of which he knew nothing, and of using a most dangerous liquid, with the effect of which, in the judgment of charity, he must be supposed to have been unacquainted. If, with gross ignorance of the subject, he, with the desire of gain, undertook the case, and, in consequence, death ensued, it would be clearly a homicide by no means *425] either justifiable or excusable. The law admitted of no doubt. If a party, grossly ignorant, undertook to deal with deadly remedies, without knowing the effect they would produce, he was answerable criminally, if they occasioned death. The question, whether regularly educated or not, did not apply. A regular medical education might furnish a defence which an uneducated person could not have, but the absence of such education certainly did not make a person guilty. The only question was, whether, in point of fact, the prisoner was ignorant of that which he was about, and whether that ignorance was the cause of his patient's death. If a man in the most extensive practice were to take cognisance of a particular case, of which, by his treatment, he showed that he was clearly ignorant, his great practice would not be any excuse.

The witnesses called on the part of the prosecution were, Capt. Lloyd, the husband of the deceased; Mrs. Campbell, a relation, at whose house she was staying; Mr. Campbell, Mr. Vance, Mr. Brodie, and Mr. Frankum, surgeons.

From the examination in chief of Capt. Lloyd, the following facts appeared—the deceased for several years had been troubled occasionally, when she caught cold, or anything excited her, with a choking sensation in the throat, for which she had, about three years before her death, consulted a medical man, and for which she was in the habit of applying a blister to the throat, and afterwards of healing the wound with a simple dressing of spermaceti ointment. A son of the deceased was under the care of Mr. Long; and on various occasions, when the deceased attended with her son, she mentioned, in conversation with Mr. Long, the complaint she had in her throat; and the conversations eventually led to her putting herself under his care on the 6th of October, 1830, at which time she was in very good general health. On the 3d of October, she had applied *426] a small blister to her throat, but the wound occasioned by it was nearly well on the 6th; on the 7th, 8th, 9th, and 10th, she went to Mr. Long's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th she was very unwell all day, and complained of great thirst, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied, and when they were removed, they appeared slimy from the discharge; the night of the 11th was passed very uncomfortably. On the morning of the 12th, the redness on the breast and chest was, if anything, greater, and the spot in the centre more puffed up and darker; the redness was more spread round the edges, and, where it stopt, there were blisters in the skin, apparently from the discharge; the inner part of the arms also was very red where the discharge had run down on each side. On the 12th she was very feverish and restless, and had no appetite; and in consequence of these symptoms, Capt. Lloyd went to Mr. Long about

the middle of the day; Mr. Long asked why Mrs. Lloyd had not come to inhale, *and go on with the rubbing*; Capt. Lloyd replied, it was impossible, she was so very ill; that she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness; Mr. Long said, he dare say it would soon go off, it was generally the case. He was told of the shivering and chillness, and that some hot wine and water had been given to relieve her; he said, hot brandy and water would have been a better thing, and to put her head under the bed clothes. He was told that the chest and breast looked very red and very bad; he said, that was generally the case in the first instance, but it would go off as she got **better*, and that Capt. L. need not be uneasy about it, as there was no fear or danger; Capt. Lloyd requested him to ^[*427] call in the evening, and told him where Mrs. Lloyd was, which it appeared *he did not know before*; in the evening he came and saw her: in the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. He said he was very sorry to see her so unwell, that she ought to have endeavoured to get up and come to him, and he would have relieved her; she said, it was impossible, she was in such pain and suffering, and with her breast open in that way it might be dangerous. He desired to look at it, and observing the dressing, said, those greasy plasters had no business there, and she ought to have continued the cabbage leaves. She said she could not bear the pain of keeping them on. He then took off his great coat, and said he would rub it out; and he turned up the cuff of his coat as if for the purpose of doing so. She exclaimed very much with fright, and expressed her wonder that he should think of rubbing in the state her breast was in. She asked if there was no way of keeping the leaf on without touching the breast; and he asked her what she wished. She replied, "To be healed." He said, it would never heal with those greasy plasters, that was not the way in which he healed sores. He then asked for a towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said, that old linen was the best thing to heal a wound of that kind. She said, her skin and flesh were very healthy, and always healed immediately with the simple dressing she had used. He said, old linen was better, but she might use the dressing if she liked, he saw no objection, and, *when it skinned over, he would rub it again*. She said no, *she thought she could never submit to rubbing again*, from what she was then suffering. He then went away. On the evening of the following day (the 13th) he **called again*, but Mrs. Lloyd would not see him, and begged her husband not to allow him to come ^[*428] up; and he never saw her afterwards. She died on the 8th of November, just a month and a day after she put herself under Mr. Long's care.

On the cross-examination of Capt. Lloyd, he said, that his son continued to attend Mr. Long for several days after the commencement of the deceased's illness, and on one occasion was desired to tell Mr. Long that he need not come to see her, as she was better. He also added, that a person, describing himself as a medical man, and saying that he was sent by Mr. Long, applied to see Mrs. Lloyd, and was not allowed. He also admitted, that he had told Mr. Long that he could not pay fees for his son until after Christmas, and that Mr. Long said that would not make any difference, he might send him and he would attend to him.

Mrs. Campbell stated that Mrs. Lloyd was in a very good state of health, except that her throat was sometimes troublesome; that she complained of a stoppage in swallowing; that on the 10th of October, when the shivering came on, the bed was warmed, and Mrs. Lloyd put in, and bottles of hot water were applied to her feet; and that, when Mr. Long went away, after having seen her, he did not give any directions as to diet, or order her any internal medicine. It also appeared from her evidence, that, previous to Mrs. Lloyd's putting herself under the care of Mr. Long, she had attended three days at the inquest held on the body of Miss Cashin. (a)

(a) For the account of Mr. Long's trial for the manslaughter of Miss Cashin, *vide ante*, p. 398.

From the examination in chief of Mr. Campbell, the surgeon, it appeared that he was the son of Mrs. Campbell, at whose house the deceased was on a visit, and that, he first saw the deceased about four o'clock in the afternoon of *429] the 12th of October, at his mother's desire; at *which time he found a very extensive wound covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid; that the skin was destroyed, and lay in folds on the chest, entirely separated; that the cellular tissue was partly destroyed, and there was a considerable discharge generally; that the wound extended nearly from one armpit to the other, and from the throat down to the pit of the stomach; that the skin was off both breasts, and the centre of the wound was darker, and in a higher state of inflammation than the other parts; that *he removed the cabbage leaves, and applied the dressing of spermaceti ointment*; that he saw the deceased on the 13th, and afterwards daily, several times a day, till her death; that he considered the wound very dangerous to life when he first saw it, but only continued to apply the spermaceti dressing till the 21st of October, when he called in the assistance of Mr. Vance, who continued at first to apply the same dressing, only adding to it a little calamine powder; that, on the second or third day of his attendance, Mr. Vance applied a bread and water poultice; that he (Mr. Campbell) at first gave Mrs. Lloyd some saline aperient medicine, and when the centre spot, and the upper part of the chest, became gangrenous, which they did in about a week, in order to support nature, she had bark, mineral acid, and quinine. The witness added, that, in his opinion, Mrs. Lloyd died of the wound which he first saw; that according to his judgment, it was not necessary or proper to produce such a wound, to prevent any difficulty in swallowing; and that he did not know of any disease in which the production of such a wound would be necessary or proper. He further stated, that he informed Mr. Vance of the course he had pursued, and that nothing which he or Mr. Vance applied could possibly increase the danger of the patient. On his *cross-examination* he said, that he had been in practice six or seven years; that, in the course of his practice, he *430] had known a common blister often produce very *injurious effects, which the person who prescribed it never contemplated, and that a medical man must regulate his treatment as well by the statements of the patient, as by external appearances; that he did not wish for any additional assistance till gangrene commenced, though he feared it would take place from the first; and that he stated the danger he apprehended, very soon after he was called in, to his mother, and Captain Lloyd, and a sister of the deceased, but that twice they had some hopes of her eventual recovery. On his *re-examination*, he said that he did not consider it a case of difficulty in the treatment; that he was present at the *post-mortem* examination; and that the wound did not present the appearances which he had ever seen produced by a common blister. In answer to *questions from the Judge*, he said, that he thought rubbing on the 12th of October, when he first saw the wound, would have increased the inflammation and could not have been in any respect beneficial.

Mr. Vance's evidence agreed in substance with the account of the appearances of the wound, as given by the other witnesses. He stated also, that he approved of the treatment pursued by Mr. Campbell. He added, that he had attended Mrs. Lloyd about three years before her death for an affection of the throat, which he at first thought a case of narrow *œsophagus*, but afterward ascertained to be *globus hystericus*; which he described as an inverted motion of the muscular fibres of the canal, very common among women in early life, and of which he had seen many thousand cases, but never knew it produce death. He described the appearance of the body after death, and said it was internally and externally in perfect health, with the exception of a partial disease of the thyroid gland, and an inflammatory affection of the lining of the windpipe (occasioned from their contiguity to the ulcer), and a little narrowness at the entrance *431] of the *œsophagus*, which he believed to be congenital, as there was no thickening of the part. He attributed the death of *Mrs. Lloyd to the

extent of the mortification caused by high inflammation, produced by some powerful application. On his *cross-examination*, he said, that at one time he had hope, because he found the healthy and unhealthy parts were separating. In answer to *questions from the Judge*, he said, that the state of the wound, as described, on the 12th of October, might produce the result stated; that he thought a man of common prudence or skill would not have applied a liquid which in two days would produce such extensive inflammation; though all irritating external applications sometimes exceeded the expectations of the medical attendant; but he should say, that such conduct was a great proof of rashness and of ignorance. In answer to a *question from a juror*, he stated, that it was very difficult to say, whether, if he had been called in on the 12th, he could have prevented the death; but, if he were to make a positive reply, he should say that it was not likely that he could, as it seemed to be a case of great peril from the beginning.

Mr. Brodie stated that he saw the deceased at the request of Mr. Vance on the 29th of October, and saw a large sloughing ulcer, which he believed might have been produced by rubbing a corrosive liniment into the parts on the 10th of October; that he did not know of any disease which should lead a person to apply a liniment with the intention of producing such an effect. On his *cross-examination*, he said:—"It is, and always has been, the practice to produce counter irritation, and the same application may be beneficial to one person and injurious to another, according to the habit and constitution. The effect of a liniment or blister, or any other external irritant, as we call them, sometimes goes beyond the effect we intend it, and the most scientific practitioner may often be deceived in his expectation; he cannot always calculate to a nicety. I do not recollect at this moment any instance in which death has ensued from a blister properly applied, but I suppose it may happen. I suppose over exercise *would produce over irritation where a blister had been applied. In treating a wound, I should judge from the appearances and the state of [432] the patient. I think it would be desirable, under such circumstances, to know the nature of the application; but I do not think it would lead to any great difference in the treatment. In cases of poison, we do not apply the same remedy, especially where it has been taken into the stomach. As to external applications, I do not think a surgeon would judge so much from what had been applied as from the appearances. Circumstances may occur in which, when a particular course is intended, a stranger's coming in and pursuing another and different course would produce mischief."

On his *re-examination*, he said:—"In the case of such a wound as has been described and I saw, I should not have thought it necessary to resort to the person who had produced it; and I doubt whether, in this case, it would have led to any useful knowledge."

In answer to *questions from the Judge*, he said:—"Though I do not think it absolutely necessary, I should have got at the matter if I could. I should think that the spermaceti ointment would not certainly increase the danger of such a wound as that described on the 12th of October. I never saw such an effect produced by an ordinary medical application. There are some constitutions in which very slight remedies will produce dangerous consequences. I have seen one person die of the bite of a leech, and another by the sting of a bee. I had no means of knowing anything of this lady's constitution. I should believe, from the evidence I have heard of the way in which the inflammation made progress, that it proceeded rather from the nature of the application than from the constitution of the party; but it may have depended on both. It is usual to try to ascertain the nature of the constitution. We cannot always do it, but in using potent remedies we use great caution. I cannot form a positive opinion whether the liniment was rashly used or not, but *the impression on my mind is, that it was used without sufficient caution, and, therefore, [433] either rashly or ignorantly. I have seen many instances of inflammation

from external application, but I never saw so extensive an effect produced as in this instance."

Mr. Frankum then proved that he saw Mrs. Lloyd about a week before her death, and was present at the *post-mortem* examination. His opinion was, that she was very healthy, and that there was not, as far as he could judge, any peculiarity of constitution which would account for the violent effects produced.

Alley, for the prisoner. The facts alleged are not legally established, admitting for the present that the evidence is correct. Some of the counts charge the death to have been occasioned by an ulcer and sore produced by an external application, and also by the inhaling of a certain noxious vapour. But as no evidence has been offered with respect to the inhaling, that is not now the subject of inquiry. The substance of the other counts is, that the death was occasioned by the external application which is alleged to have been improperly made. There is no count imputing ignorance or want of skill, or hastiness, or roughness of practice; and therefore, there being no allegation of that kind, no evidence can be used to influence the Jury on that subject. The rules, with respect to indictments, are clear. In *Overbury's* case, Lord Coke lays it down, that no evidence can be given of any other cause of death, than that which is stated in the indictment. It is the mind that constitutes the individual a criminal, and not the act done, according to the old maxim of the law, "*actus non facit reum nisi mens sit rea*." This indictment charges the prisoner with the offence of manslaughter. Now manslaughter, in one view, is an offence committed on the sudden, in a moment of intemperate feeling. Another species of manslaughter is, where death has been caused in the prosecution of an illegal act. There are

*434] also justifiable homicide, and homicide *per infortunium*; and it is this latter kind of homicide of which the act complained of consists. Where a man, in an honest mind, does an act which he thinks right, and death ensues, it is homicide *per infortunium*. Lord Coke's *dictum* as to unlicensed practitioners is not law. Sir Matthew Hale repudiates it, and lays down the correct rule on the subject; and on his rule it is that I found my defence of the prisoner. That rule is adopted by all the text writers on the criminal law. It is, that, where a potion is given without any intent of doing bodily hurt, but with an intention to cure or prevent a disease, and, contrary to expectation, it produces death, it is not manslaughter. Such a charge as that against the prisoner has never, by the common law, been considered to be manslaughter. There is a modern case upon the subject, but I believe it is a solitary case, and I should be inclined very much to doubt whether it is quite correct.^(a) The statute 34 & 35 Hen. 8, c. 8, which is intituled, "A bill, that persons being no common surgeons may administer medicines notwithstanding the statute," after referring to an act of the 3d Hen. 8, subjecting to penalties persons who should practise as physicians or surgeons without being examined and admitted, goes on to say, "Sithence the making of which said act the company and fellowship of surgeons of London, minding only their own lucre, and nothing the profit or ease of the diseased or patient, have sued, troubled, and vexed divers honest persons, as well men as women, whom God hath endued with the knowledge of the nature, kind, and operation of certain herbes, roots, and waters, and the using and ministering of them to such as been pained with customable diseases, as women's breasts being sore, a pin and the web in the eye, uncomes of hands, burnings, scaldings, *435] sore mouths, the stone, strangury, saucelime, and morpew, and such other

^(a) We presume the learned Counsel alluded to the case of *Nancy Simpson*, mentioned in *Notes (a)*, ante, p. 407, as extracted from Willcock on the Laws of the Medical Profession.

daily do; but the greatest part of surgeons admitted been much more to be blamed, than those persons that they trouble." It further states that, "although the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money, and do little therefore, and by reason thereof they do oftentimes impair and hurt their patients rather than do them good." In consideration whereof, and for the ease, &c., and health of the King's poor subjects, &c., it proceeds to enact that it shall be lawful to every person having knowledge and experience of the nature of herbs, &c., to practise, use, and minister them without suit or vexation.

The question is one of very great importance. A man who has to amputate a limb, will have the knife tremble in his hand, if he is to be liable when he has acted with a good intent. The provisions of the stat. 34 & 35 Hen. 8, c. 8, show that every man has a right to practise, and, if death ensues when the intention is good, the party cannot be guilty of manslaughter. The prisoner cannot call any witness to prove what the liquid was, as its composition is known only to himself; and indeed it is alleged in the indictment to have been secretly prepared by him. It cannot be ruled, that, where the mind is pure, and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed, of the mode of performing which no evidence is given, the party is responsible. In East's Pleas of the Crown, Vol. 1, p. 264, the learned writer says, "If one who is no regular physician or *surgeon, [436 administer medicine, or perform an operation, which, contrary to expectation, kills, it was formerly holden manslaughter. But Lord Hale denies this very properly: *it is rather misadventure*. Though this doubt should make ignorant people cautious how they interfere in such matters. But if one give physic to another *in sport*, of which he dies, it will be manslaughter," &c. -The case of The King against Van Butchell, reported in 3 C. & P. 629, is also in point on this subject.

BAYLEY, B. We are aware of all these cases. There are, in my mind, contradictory authorities, and I propose, with the assent of my learned brothers, to reserve the point for you, if the prisoner should be convicted. I agree with my Lord Hale, and do not think that there is any difference between a licensed and an unlicensed surgeon. It does not follow that, in the case of either, an act done may not amount to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be laid out of the question in this case. But the manner in which the act is done, and the use of due caution, seem to me to be material. Mr. Justice Foster, in his Criminal Law, p. 263, speaking of a person who happens to kill another by driving a cart or other carriage, says—"If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection*." And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that, there being conflicting authorities, and the impression on our minds not being in your favour, I propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is, that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the Jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act. For, if a man, either with gross ignorance, or gross rashness, administer medicine, and death ensue, it will be clearly felony.

**Alley*. Then I submit, that, in this case, as in a case of larceny, [437 there must be a trespass proved. Trespass is the foundation-stone of felony. It is not proved that any fraud has been practised by the prisoner to get the patient under his care. Nor has there been any avaricious seeking after fees. If there had been, it might have been evidence to show the existence of trespass; but it was not so, according to the testimony of the husband. The prisoner's conduct showed that his intentions were good and honest. If he had solicited the lady's attendance, then a wrong intention might be inferred, and he would be responsible. But it seems that she attended with her son, and saw

the number of patients attending, and applied to the prisoner to benefit her. As to a man's driving a cart, as mentioned by Mr. Justice Foster, if he is going too quick, he is liable; if he is going at a proper pace, he is not responsible. If the rule I contend for is not to be adopted, the good Samaritan must close his Land, and those benevolent persons who are in the habit of administering to the comforts of the sick, must cease to attend the death-beds of the poor. There must be a trespass in every felony,—and trespass is not to be inferred. Upon this principle it was that Mr. Baron Hullock decided in the case of Van Butchell. Suppose that, instead of Dr. Jenner, some cow boy had found out vaccination, and exhibited the virus on certain children, and they had done well, and on others and they had died, would he have been subject to be called an impostor, and charged with introducing a virus that was injurious? Dr. Jenner persevered, and was rewarded. And why should not Mr. Long persevere, why should he, without remuneration, give up his secret any more than Dr. Jenner, or than Dr. James, who invented the powder which goes by his name. The case of Van Butchell is all fours with the present. The learned Judge stopped that case because there was no evidence of how the operation was performed; and here there is not any evidence to show the mode in which the application was made.

*438] *BAYLEY, B.* In this case, we may judge of the thing by the effect produced, and that may be evidence from which the Jury may say whether the thing which produced such an effect was not improperly applied.

BOLLAND, B. When you pass the line which the law allows, then you become a trespasser.

Adolphus was heard shortly, and contended, that if a person's intention was only to be *helpful*, he could not be guilty of manslaughter.

Alley then said, that, if his Lordship thought it would be most conducive to the interests of justice that the point should be reserved, he would yield to that opinion without further observation.

BAYLEY, B. If I had a clear opinion in your favour, or if my brothers had, or if we had any reason to think that other Judges were of a different opinion, it would become our duty to give our opinion here, and prevent the case from going to the Jury. But, feeling as I do, notwithstanding all I have heard to-day, and myself and my brothers having had our attention directed to the law before we came here, I think it right that the case should go to the Jury. I think that if the Jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness. And I consider that rashness will be sufficient to make it manslaughter. As, for instance, if I have the tooth-ache, and a person undertakes to cure it by administering laudanum, and says "I have no notion how much will be sufficient," but gives me a cup-full, which immediately kills me; or, if a person prescribing James's powder says, "I have no notion how much ought to be taken," and yet gives me a *tablespoonful, which has the

*439] same effect; such persons acting with rashness will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and the willingness of the patient cannot take away the offence against the public.

The *prisoner* in his defence said, that the prosecution was, in reality, that of the medical gentlemen, who did not prosecute other medical men, but attacked him, because his patients were the incurables of the faculty, and because he cured consumptions which they were never able to do. He contended, that it was not just to render him responsible, when the death occurred while Mrs. Lloyd was under the care of others, and neither he nor his medical friend were allowed to do anything for her. He also charged Mr. Campbell with unskilfulness in his treatment of the case, and argued, that, if the mixture had been of the injurious nature suggested, it must have produced mortification much

earlier than, according to the evidence, it did. He further stated, that he could prove, if it were necessary, that he had studied anatomy, and was acquainted with the constitution of the human frame.

For the defence, twenty-six witnesses were called, who spoke in the highest terms of the prisoner's skill, care, and attention. Most of them had been his patients, and a few had been witnesses of his treatment of some near relations. Many of them not only gave their own opinion, but also stated the general reputation he had among other persons who attended at the same time. One of them said, "his attention cannot be exceeded; I have found more skill in him, and derived more benefit from him than all the doctors I ever consulted." Another said, "I think him the kindest, the most attentive, and the most skillful person I ever met with." Another said, "I have reason to praise his skill, for he cured my child of consumption; and I have *reason to praise his kindness, for he only took half fees." Several said, that they had [*440] known him cure persons who had resorted in vain to other medical men.

BAYLEY, B., in summing up, said:—The indictment charges the prisoner with having caused the death of Mrs. Lloyd, by the application of a certain liquid; and the points for your consideration will be—first, whether Mrs. Lloyd came to her death by the application of the liquid; and secondly, whether the prisoner, in applying it, has acted feloniously or not. To my mind, it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he *has acted with a due degree of caution*, or, on the contrary, has acted with *gross and improper rashness, and want of caution*. I have no hesitation in saying for your guidance, that, if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter. There is no pretence in the present case for saying that there was any degree of negligence after the application of the liquid, because it seems that the prisoner did not know where Mrs. Lloyd lived; and when he was sent for on the 12th, he went, but was almost immediately dismissed, and was not allowed to see her afterwards. If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and that it was the cause of Mrs. Lloyd's death, then, heavy as the charge against him is, he will be answerable on this indictment for the offence of manslaughter. There was a considerable interval between the application of the liquid, and the death of the patient; yet, if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say, that a different course of treatment by Mr. Campbell might have *prevented it. You will consider these two points:—first, of what did [*441] Mrs. Lloyd die? You must be satisfied that she died of the wound which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied of this—whether the application was a felonious application. This will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects, in such a manner that it did actually produce them. If you think so, then he will be answerable to the full extent. His Lordship read over the evidence, requesting the Jury to apply it, as he proceeded, to the two points he had mentioned; and, after some deliberation, they returned a verdict of—

Not guilty.

Denman, A. G., Whateley, and Talfourd, for the prosecution.

Alley, Adolphus, C. Phillips, and Clarkson, for the prisoner.

[Attorneys—Vizard & Co., and Harmer.]

*442] *HAMPSHIRE SPECIAL COMMISSION, 1830.

BEFORE MR. BARON VAUGHAN, MR. JUSTICE J. PARKE, AND MR. JUSTICE ALDERSON.

WINCHESTER.

BEFORE MR. BARON VAUGHAN, AND MR. JUSTICE ALDERSON.

REX v. CHILDE and Others. Dec. 28.

If, in reading the proclamation from the riot act, the magistrate omit to read the words "God save the King," at the end of it, persons remaining together for an hour after such reading of the proclamation cannot be capitally convicted under sect. 1 of that act.

INDICTMENT on the stat. 1 Geo. 1, stat. 2, c. 5, s. 1 (the riot act), for a capital felony, in remaining together for one hour after the making of the proclamation under that statute. (a)

*443] It appeared, that, about two hundred and fifty persons had assembled together in a riotous manner, and had threatened to break threshing-machines, when Dr. Jones, a magistrate, read the proclamation from the riot act, 1 Geo. 1, stat. 2, c. 5; but, in the reading of it, he omitted to read the words "God save the King," at the conclusion.

Mr. Baron VAUGHAN, and Mr. Justice ALDERSON, held, that, as those words at the end of the proclamation were omitted to be read, the charge could not be supported.

Their Lordships directed an

Acquittal.

(a) By the stat. 1 Geo. 1, stat. 2, c. 5, s. 1, it is enacted—"That if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord one thousand seven hundred and fifteen, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head-officer, or justice of the peace of any city or town-corporate, where such assembly shall be, by proclamation to be made in the king's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy."

And by sect. 2, of the same stat. it is enacted—"That the order and form of the proclamations that shall be made by the authority of this act, shall be as hereafter followeth (that is to say), the justice of the peace, or other person authorized by this act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making; and after that, shall openly and with loud voice make or cause to be made proclamation in these words, or like in effect:—

"Our sovereign lord the king chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies.
God save the King."

"And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head-officer, aforesaid, within the limits of their respective jurisdictions, are hereby authorized, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assemblies shall be of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid."

*Denman, A. G., Dampier, and Follett, for the prosecution.
Sewell, for the prisoners.

[*444

BEFORE MR. JUSTICE J. PARKE.

REX v. WINKWORTH and Others.

if persons who had formed part of a mob, obtain money from a party by advising him to give money to the mob, and be indicted for this as a robbery—The prosecutor, to show that this was not *bona fide* advice, may give evidence of demands of money made by the same mob at other places before and afterwards in the course of the same day, if any of the prisoners were present on those occasions.

INDICTMENT for a robbery. It appeared that the prisoners went with a mob to the prosecutor's house, and that one of the mob went up to the prosecutor, and very civilly, and, as the prosecutor then believed, with a good intention, advised him to give them something, to get rid of them, and prevent mischief; and that he, in consequence of this, gave them the money which was the subject of the present indictment.

To show, that this was not *bona fide* advice to the prosecutor, but in reality a mere mode of robbing him, the counsel for the prosecution proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the prisoners were present. And they cited the case of *Rex v. Ellis*.^(a)

Poulter, and *C. Saunders*, for the prisoners, objected, that the fact, that money had been demanded at other places, would be no proof that there had been any demand made on the prosecutor, and that this was in effect trying the prisoners upon other charges, which they could not *be prepared to meet. [*445 And with respect to the case of *Rex v. Ellis*, they observed, that there all the offences were committed against the same person, and were parts of the same transaction.

Mr. Justice J. PARKE (having conferred with Mr. Baron Vaughan, and Mr. Mr. Justice Alderson). We are of opinion, that what was done by the mob before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present, may be given in evidence.

The evidence was received.

Wilde, Serjt., and *Follett*, for the prosecution.

Poulter, and *C. Saunders*, for the prisoners.

Mr. Justice J. PARKE afterwards stated, that the Learned Judges of this commission had communicated with Lord Tenterden, and that his Lordship concurred with them in this opinion.

(a) 9 D. & R. 174. In that case it was held, that where several felonies are so committed as to form parts of one entire transaction, evidence may be given of all of them to establish the specific felony, for which the prisoner is indicted.

*446] *WILTSHIRE SPECIAL COMMISSION. 1831.

BEFORE THE SAME LEARNED JUDGES.

SALISBURY.

BEFORE MR. BARON VAUGHAN, AND MR. JUSTICE ALDERSON.

REX v. WITHERS.

Inflicting a wound on a person by throwing a sledge-hammer at him, is a wounding within the stat. 9 Geo. 4, c. 31, s. 11, 12, although the sledge-hammer, from being blunt, was not an instrument calculated to inflict a wound.

INDICTMENT on the stat. 9 Geo. 4, c. 31, for wounding a person named Codrington with intent to murder him. There were the usual counts laying the intent to disable, &c.

It appeared that the prisoner had thrown a sledge-hammer at the prosecutor. The hammer, which was blunt on all sides, and had no claw, struck Mr. Codrington on the head, and broke the skin, inflicting a wound on the side of his head.

The prisoner had been acquitted on the count which laid the intent to murder, and convicted on the other counts.

Ball, for the prisoner, suggested that this was not a case within this statute, and argued that Lord Ellenborough, in the framing of the stat. 43 Geo. 3, c. 58, had gone to the extent of legal propriety in including cases of stabbing and cutting; and that the gentleman who had prepared Lord Lansdowne's act, had probably had in view the cases in which it had been held, that, if a person was indicted for a cutting, he could not be convicted if the injury was in fact a stab; *447] and that, to avoid such difficulties, the word "wound" had been introduced; and he argued, that if the instrument, from being a blunt one, was not calculated to wound, it was not a case within the act, although the blow given might be such as to cause a breaking of the skin; and cited a case decided at Chester before Lord Chief Justice Dallas.^(a)

Mr. Baron VAUGHAN, Mr. Justice J. PARKE, and Mr. Justice ALDERSON, reserved the point.

Denman, A. G., *Coleridge*, and *Follett*, for the prosecution.

Ball, for the prisoner.

[Attorneys—*Maule & B.*, and *Seymour & H.*]

IN the ensuing Term the Judges held, that this was a wounding within the stat. 9 Geo. 4, c. 31; and that the conviction was right.

(a) That case is cited in Russell on Crimes and Misdemeanors, tit. *Attempts to Murder*, &c.; and it was there ruled, that a blow with a handle of a windlass was not a cutting within Lord Ellenborough's act, although it had made an incision. See also the case of *Rex v. Wood*, ante, p. 381.

*BERKSHIRE SPECIAL COMMISSION. 1831. [*448

BEFORE MR. JUSTICE PARK, MR. BARON BOLLAND, AND MR. JUSTICE
PATTESON.

ABINGDON.

REX v. MACKEREL and Another. Jan. 6.

If a person has had a threshing-machine taken to pieces, he expecting a mob to come and destroy it, and the mob come and destroy the different parts of the machine when thus separated—This is a felony within the stat. 7 & 8 Geo. 4, c. 30, s. 4.

INDICTMENT for destroying a threshing-machine. The first count of the indictment charged the prisoners with “breaking” the machine. The second count charged them with “destroying” it. The third count with “damaging it with intent to destroy it.” And the fourth count with “damaging it with intent to render it useless.”

It appeared that a mob had come to the house of the prosecutor to destroy his threshing-machines, and the prisoner's counsel was proceeding to show, by cross-examination, that the prosecutor, in expectation of the coming of the mob, had himself taken his threshing-machine to pieces, and that the prisoners only broke the detached parts of it.

Mr. Justice PARK. It has been held by the Judges, both at Reading and Winchester, that the offence is made out, although, at the time when the machine is broken, it has been taken to pieces, and is in different places, only requiring the carpenter to put those pieces together again. There have been several convictions under such circumstances. Verdict—Guilty.

*Gurney, Campbell, Shepherd, Blackburn, and Talfourd, for the prosecution. [*449

Carrington, for the prisoners.

[Attorneys—Maule & B., and Frankum.]

By the stat. 7 & 8 Geo. 4, c. 30, s. 4, it is enacted—“That if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing-machine, or any machine or engine, whether fixed or movable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials, mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment.”

REX v. FIDLER and Others. Jan. 6.

A. had a threshing-machine worked by water, the water-wheel having been put up for the sole purpose of working this machine, and never having been used for anything else. A., fearing the destruction of the machine by a mob, took it down, leaving the water-wheel standing. The prisoners broke the water-wheel:—Held, to be a felony, under the stat. 7 & 8 Geo. 4, c. 30, s. 4; and the fact that A. sometimes worked the threshing-machine by horses, will make no difference.

INDICTMENT for destroying and damaging a threshing-machine. The indictment was in the same form as in the preceding case.

The prosecutor stated, that his threshing-machine was worked by water; and

that, expecting a mob would come to break it, he had had it taken to pieces, and had removed the pieces to a barn at the distance of a quarter of a mile, leaving no part of it standing but the water-wheel and its axis, and a brass joint, which was joined to the axis of the water-wheel; and that this water-wheel was broken by a mob, of which the prisoners formed a part. The prosecutor stated, that this water-wheel had been put up for the sole purpose of working the threshing-machine, and had never been used for anything else, except sometimes to work a chaff-cutter, which was appended to the threshing-machine.

*450] *Carrington*, for the prisoners. I submit that the breaking of this water-wheel was not a breaking of any part of the threshing-machine. This wheel not being any part of the machine, but the moving power, which was applied to set it in motion; and therefore, when the threshing-machine was slipped out of the brass joint, any other machinery might be applied to the joint, and the wheel would then set that machinery to work the same as it did the threshing-machine. Indeed, if this wheel was held to be a part of the threshing-machine, a steam engine must be held to be so too, provided that the threshing-machine had been worked by steam; and it is manifest that the moving power is no part of the machine which it worked, because in manufactories nothing is more common than for one machine to be slipped out of the joint which connects it with the moving power, and for another machine to be slipped into it, as the business of the manufactory required.

Gurney, Campbell, Shepherd, and Blackburn, contrd. The moving power is an essential part of the machine. In threshing-machines, it is generally a horse-wheel, in this instance it happens to be a water-wheel. Now, in at least ten cases, where all the other parts of the machines had been carried away by the owner except the horse-wheel, and the horse-wheel was broken by the mob, it was held that that was an offence within the act of Parliament; and this case is certainly not distinguishable from any of those. Another thing showed that this was not only a part of the machine, but an essential part, for, when this was destroyed, the machine could not work.

Mr. Justice PARK. We think that there is nothing in this objection. We think that the machine, when all together was a threshing-machine, and that this wheel was a part of it; and besides, this wheel had never been used for any other purpose.

*451] Mr. Baron BOLLAND. The objection is, that this *water-wheel was no part of the threshing-machine. Perhaps, there is rather an inaccuracy in calling this wheel the moving power. The moving power of machinery may either be horses, the hand, water, or steam; and this which was broken, was, in fact, the first or great wheel of the machine, to which the power was applied. With respect to the fact that this wheel might have been applied to other machinery, the same may be said of the horse-wheels. If a horse-wheel stood in a farm-yard, the owner, by adding some gear, might make it draw water.

Mr. Justice PATTESON. This wheel is that to which the power was applied.

Carrington. It has been suggested to me, that the prosecutor sometimes worked his threshing-machine by horses when there was a scarcity of water.

Mr. Justice PARK. We think that that would make no difference.

The prisoner Fidler was acquitted on the merits, and the other prisoners found guilty.

Gurney, Campbell, Shepherd, Blackburn, and Talfourd, for the prosecution.

Carrington, for the prisoners.

[Attorneys—*Maule & B.*, and *Lockton.*]

*COURT OF KING'S BENCH.

[*452]

ADJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM, 1830.

BEFORE LORD TENTERDEN, C. J.

BOWEN and Others v. FOX and Others. (a) Dec. 23.

The master and part owner of a ship, compelled by stress of weather to put into a certain port on a voyage, incurred debts there in respect of the ship, for which he was arrested. Upon this, he sent to the ship agents the certificate of registry, accompanied by a letter, in which he stated that he lodged it with them as a security for the payment of all demands and charges on account of the vessel since she had been in the port, adding that he hoped it would be satisfactory to them. The agents received the register but did not pay the demands, nor would they return the register to the master:—Held, that the receipt of the register, on the terms in the letter, did not create any implied contract on the part of the agents to pay the demands, but that the terms of the letter evidenced a promise on the part of the master that the ship should not leave the port till those demands were satisfied.

THE first count of the declaration stated, that the plaintiffs, and one H. F. Myers, deceased, at the time, &c., were the owners of a certain brig or vessel, called *The Gratitude*, and of the tackle, &c., thereto belonging, then on a voyage from *Hamburgh* to *Jamaica*, of which vessel the plaintiff *Bowen* was master; that, while the said vessel was proceeding on her said voyage, she was obliged to put into the port of *Falmouth*, to be repaired and refitted; and the said plaintiffs, and H. F. Myers, were obliged to contract with divers persons debts to a large amount, to wit, &c., in and about the repairing and refitting of the said vessel; which debts they were unable to pay. And thereupon, to wit, on the 19th of May, 1824, in consideration that the said plaintiffs and H. F. M. would, at the request of the defendants, lodge in their hands the certificate of the registry of the said vessel as a security for the payment of all demands and charges on account of her since she had been in the said port of *Falmouth*, they the said defendants undertook and promised to pay and discharge all such demands and charges. It then averred that the plaintiffs and Myers did lodge the said certificate of registry in the hands of the defendants as a security, *&c., and that the defendants received the same for the purpose aforesaid. It then [*453] further averred, that, since the said brig or vessel had been in the said port of *Falmouth*, they the said plaintiffs and H. F. Myers incurred a demand on account of her, in and about repairing and refitting her, with one *Henry Laine Simmons* to the amount of 150*l.*, of which the defendants had notice; yet that they, not regarding their said promise, &c., but contriving, &c., did not nor would pay or discharge the said demand, but wholly neglected and refused; by reason whereof the said *Henry Laine Simmons* afterwards, &c., caused the plaintiff *Bowen* (then and there being master of the said vessel) to be arrested and committed to prison for the said demand, and there to be kept and detained for a long space of time, to wit, for the space of twenty days, and thereby during that time the command of the vessel fell into the hands of one C. J. B., by means whereof she became and was wholly lost to the said plaintiffs and Myers; and they were deprived of divers great gains and profits which they might otherwise have made by the employment of the vessel, and were also put to great expenses in discovering her, and endeavouring to regain possession of her.

There were other special counts, varying in the manner of stating the interest of the plaintiffs in the vessel, and other particulars; but nothing turned at the trial upon the form of those counts, and, therefore, they are not set out. There

were also the common counts for goods sold and delivered, money had and received, &c. &c.

The defendants pleaded, first, that they did not undertake and promise in manner and form as the plaintiffs had complained; and, secondly, a special plea, the substance of which was, that the cause of action in the present case had been disposed of on a trial at the assizes for Cornwall. The plaintiffs, in their replication, joined issue upon the plea of the general issue, and replied to the special *454] plea, that no evidence was given on the trial in Cornwall in support of the causes of action in the present case, nor were any or either of them in any way inquired into, litigated, or determined at that trial. The defendants rejoined, that evidence was given and the causes of action were inquired into, &c.; and on this rejoinder issue was taken.

From the evidence on the part of the plaintiff, it appeared that the brig *Gratitude*, on her way from *Hamburgh* to *Vera Cruz*, was compelled, by stress of weather, to put into the port of *Falmouth*, and while there, took fire; in consequence of which the cargo was obliged to be taken out, and the vessel went into dock; that the defendants acted as agents; that various tradespeople were employed; that the master of the vessel, the plaintiff *Bowen*, was arrested; and while he was in custody, a clerk of the defendants came to him, and said, that if he would deposit the register of the vessel in their hands, he should come out of custody; that, upon this, a letter was written by *Bowen*, at the clerk's dictation, which letter was as follows:—

“Messrs. G. C. & R. W. Fox & Co.

“Gentlemen,—You will be pleased to receive the register of the brig *Gratitude*, which I enclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the said vessel since she has been in this port, and which I hope will be satisfactory to you. The cost and expense on account of my being arrested, please to settle the same and charge to my account.

I remain, respectfully,

“Falmouth,
19th May, 1824.”

gentlemen, your obedient servant,

JOHN BOWEN.”

It also appeared that the defendants refused to deliver up the register when applied to by the master for it, and that the master was arrested a second time *455] for a debt of 150*l.* due to one *Symons*, and was sent to *Bodmin* gaol; *and that a person named *Batton* was then introduced on board the vessel by the clerk of the defendants, and took her away on her voyage as master.

It further appeared that the debts incurred between the arrival in *Falmouth* and the writing of the letter were about 300*l.*; and that, at the time of the first arrest, the vessel was nearly ready for sea, and had removed from the inner harbour to the outer road.

Sir J. Scarlett, for the defendants, contended that there was no proof of any contract by them to pay the charges for the ship.

Campbell, for the plaintiffs, answered that the written instrument was the foundation of their claim; and that a contract might be implied from that instrument, as the defendants had received the register, and afterwards refused to deliver it back, and claimed a lien on it.

LORD TENTERDEN, C. J. It does not appear to me that this contract is an engagement on the part of the defendants to pay the demands and charges. The master promises not to leave before his debts are paid, but notwithstanding he goes into the outer harbour. The question is, whether the defendants, by receiving this engagement, undertake to pay. I find no expression that the defendants promised. I must call the plaintiffs. Nonsuit.

Campbell, F. Pollock, and White, for the plaintiffs.

Sir J. Scarlett, Erskine, and Crowder, for the defendants.

[Attorneys—*A. H. Smith, and Cardall & Buxton.*]

In the ensuing Hilary Term, *White* moved to set aside the nonsuit. He contended, that, coupled with the acceptance of the register, the terms of the letter which *accompanied its deposit were sufficient to support the promise declared on—that although the expression in the letter was [*456 “a security for the payment of all demands,” &c., and not “a security for your payment, or for the payment by you of all demands,” &c., yet the following clause, “and which I hope will be satisfactory to you,” fully warranted this construction.

Lord TENTERDEN, C. J., adhered to the opinion expressed by him at the trial. He adverted to the circumstance of debts to the amount of 300*l.* having been incurred on account of the vessel while she was in Falmouth; and added, that he thought the term used in the letter “a security for the payment of all demands, &c.,” meant merely a security from the ship-owners (the plaintiffs), to their creditors, not to quit the port before they had paid their debts.

LITLEDAL, J., concurred. (a)

Motion refused.

(a) The other Judges were absent.

COURT OF COMMON PLEAS.

ALJOURNED SITTINGS IN LONDON, AFTER MICHAELMAS TERM,
1830.

BEFORE LORD CHIEF JUSTICE TINDAL.

MILTON v. ELMORE. Dec. 13.

A., the servant of B., stated before a magistrate, that C. came into the yard of his employer and took from a stable there two geldings, the property of B., and rode them away, though he was told that he must not:—Held, that this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having *feloniously stolen and ridden away with two geldings*.

THE first count of the declaration stated, that the defendant went and appeared before one Thomas Halls, *Esquire, then and there being one of the Justices of our lord the King, in and for the county of Middlesex, &c., [*457 and then and there, before the said Thomas Halls, Esquire, so being such Justice as aforesaid, at Bow street, to wit, &c., falsely and maliciously, and without any reasonable or probable cause whatsoever, *caused and procured* one John Hayes, otherwise called John Haynes, a servant of the said defendant, *to lay an information* before the said magistrate, *charging* the said plaintiff with having *feloniously stolen and ridden away with two geldings*, the property of the said defendant; and upon such charge he, the said defendant, falsely and maliciously, and without any reasonable or probable cause whatsoever, *caused and procured* the said Thomas Halls, so being such Justice as aforesaid, to make and grant his certain warrant under his hand and seal, for the taking of the said plaintiff, and for bringing him before him, the said Thomas Halls, or some of his Majesty's Justices, &c., to wit, &c., to be dealt with according to law for the said supposed offence. It then averred, that the plaintiff went voluntarily before the magistrates at Bow street to be examined; that the magistrates having heard and considered all that the defendant could say against the plaintiff concerning the said supposed offence, on the first day of February, 1830, determined that the plaintiff was not guilty, and discharged him; and that the defendant had not further prosecuted his complaint, but had abandoned it, and the prosecution was wholly ended and determined.

The second count of the declaration stated, that the defendant, on the 5th of February, 1830, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff with having committed felony, to wit, with having feloniously stolen two geldings, the property of him the said defendant; and upon such last-mentioned charge, he the said defendant, &c., falsely and maliciously caused and procured the said plaintiff to be arrested by *458] his body, and to be imprisoned, and to be *kept and detained in prison for a long space of time, to wit, for the space of six hours, at the expiration of which he was duly discharged and fully acquitted. The defendant pleaded the general issue—Not guilty.

The information of Hayes, otherwise Haynes, referred to in the first count, was put in. It was as follows:—

“*Middlesex, to wit.* The information of John Hayes, of Pear-Tree Yard, Piccadilly, in the county of Middlesex, labourer, taken before one of his Majesty’s Justices of the Peace, acting in and for the said county, this 30th day of January, in the year of our Lord 1830; who, being upon oath, saith, that on last Wednesday, about 11 o’clock, Matthew Milton came to my employer’s yard, situate in Piccadilly, and he went to the stable, and took from the stable two geldings, my employer’s property. I said, “What are you going to do with those horses, you must not take them away.” He said, he would sell them. He desired his son, who was with him, to drive one of the horses away, which he did; he then put the other horse in the gig, and he drove it away. I went to stop the horse his son was on, and Milton laid hold of me and prevented me, and his son galloped the horse away.

JOHN HAYNES.

“Taken and sworn before me, this 30th day of January, 1830.

THOS. HALLS.”

The warrant, which was issued against the plaintiff, was to “answer to all such matters and things as, on his Majesty’s behalf, are on oath objected against him by George Elmore and another, *on suspicion of feloniously stealing and riding away with two geldings, the property of the said George Elmore.*”

Andrews, and Russell, Serjts., objected, that there was a variance between the information of Haynes and the declaration. The declaration states that

*459] Haynes swore that the plaintiff had feloniously stolen and ridden away with two geldings of the defendant’s; and, in his information, there is nothing about felony. There is nothing more than a fair statement of facts, on which a magistrate might issue a warrant or not. From what appears in the information, it might be only a trespass.

Wilde, Serjt., in answer. It is said that the magistrate might have granted any other warrant than one for felony. Now, let us see what the warrant actually was which the defendant adopted, and on which he acted, and that was a warrant for horse-stealing. As to its being a mere statement of facts, it is a statement of only some facts, with a suppression of all those which would explain the transaction.

Curwood, on the same side. If the declaration cannot be supported in this form, the party must suffer the injury without any redress; and if the complainant avoids technical words charging felony, he will be safe. We are not confined to the statements in the information, but may look to the conduct of the party complaining, to show what charge he intended to be made. The whole is a question for the Jury, whether, under the circumstances, the defendant did or did not intend to charge the plaintiff with a felony.

Wilde, Serjt., then proposed to prove, by the evidence of the magistrate, a distinct statement by the defendant that the plaintiff had committed the offence of horse-stealing. He offered it as evidence on the second count, which contained an allegation that the defendant himself made the charge.

The witness was allowed to be examined, and stated what occurred before him, when he was attended by Mr. Curwood on one side, and Mr. Adolphus on the other; but, on his cross-examination, he said, that he acted in granting

*his warrant upon the evidence taken down, and not upon the arguments [460 of counsel.

The book of the evidence taken down at Bow street was then produced, and from that a statement made by the defendant was read; it was, that, "he suspected and believed, from the information of Haynes, that Milton had stolen two horses from him."

Russell, Serjt. The second count goes on to say, that, on the *said last-mentioned charge*, the defendant caused the plaintiff to be imprisoned, and that shows clearly that it was the charge upon which the plaintiff had been arrested.

Wilde, Serjt. The gist of the count is, the malicious charge, and the detention in custody is only aggravation. The evidence makes out distinctly that the defendant did make the charge of horse-stealing against the plaintiff.

Jones, Serjt., on the same side. A general accusation of felony is all that is necessary, and that is clearly shown to have been made.

Russell, Serjt. The objection is, that a well-known averment has not been proved; the charge is clearly one upon which something took place. If that part is rejected, then it is no charge on which the action can be maintained, for the action cannot be maintained upon a charge upon which nothing followed.

TINDAL, C. J. Upon looking at the charge which is made in the information, it appears that it is only one of trespass, and not of felony; therefore, the first count is not proved. It has been said that the party would be without redress if the declaration could not be supported in that form. But, if the first count had been framed simply that the defendant maliciously caused the plaintiff to *be arrested, the amount of damages would probably have been the same. [461 As to the second count, if I am to give a meaning to every word, then that count is not proved. But it is not sufficiently clear to justify me in stopping the cause, because it may be that the latter part of the allegation may be rejected. I shall, therefore, allow the cause to proceed, and give the defendant leave to move if I am wrong in so doing.

In the course of the cause, *Wilde*, Serjt., inquired of one of the witnesses, as to a subsequent charge of horse-stealing, which had been made at Marlborough street office, by the defendant against the plaintiff.

Andrews, and *Russell*, Serjts., objected, that what occurred afterwards could not be given in evidence, as it might be made the subject of another action.

Wilde, and *Jones*, Serjts., answered, that there were two points in the case: one as to reasonable and probable cause; and the other, as to the amount of damages; and that, although it was not evidence on the first point, yet it clearly was on the second, to show *quo animo* the act complained of in this action had been done.

TINDAL, C. J., was of opinion that it was admissible, in aggravation of the damages, as evidence of the motive with which the defendant had acted.

It turned out that Mr. Halls, the magistrate, had issued his warrant on an information by the defendant, that the plaintiff had stolen the horses, having refused to issue it on the information of Haynes alone. This information had, by mistake, been struck through in the books of the office at Bow street, which accounted for its not having been at first adverted to.

It appeared that there was a question of partnership *between the plaintiff and defendant in the horses. And the plaintiff had, eventually, a [462 Verdict for 150*l*.

Wilde, and *Jones*, Serjts., and *Curwood*, for the plaintiff.

Andrews, and *Russell*, Serjts., for the defendant.

[Attorneys—*E. Isaacs*, and *W. Archer*.]

CORY and Another v. BRETTON. Dec. 15.

A letter sent by a debtor to a creditor, respecting a debt, which contains, in the introductory part, these words, "*which is not to be used in prejudice of my rights now, or in any future arrangement that may be made or instituted,*" cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the statute of limitations.

ASSUMPSIT. Pleas—The general issue, the statute of limitations, and a set-off. Replication, denying the defendant's plea of the statute, and replying the statute to his plea of set-off.

On the part of the plaintiffs, *Bompas*, Serjt., opened, that he should propose, for the purpose of taking their demand out of the statute of limitations, to read a letter written to them by the defendant. This letter, it appeared, contained in the introductory part of it these words, "*which is not to be used in prejudice of my rights now, or in any future arrangement that may be made or instituted.*"

The learned Serjeant contended, that these words ought not to have the effect of preventing the letter from being given in evidence, as there was not any assent on the part of the plaintiffs to the stipulation. If a letter had been previously written mentioning such terms, and the plaintiffs had not expressed any dissent, and the letter in question had been subsequently written, then the case would have been very different.

*463] **TINDAL, C. J.** If the plaintiffs did not like the letter *with such a stipulation in it, they might have sent it back. I cannot make any distinction between a written and a verbal communication; and, if it were a verbal communication, I should certainly not admit it in evidence. It is clearly a conditional statement.

Bompas, Serjt., and *R. Gurney*, for the plaintiffs.

Wilde, and *Adams*, Serjts., for the defendant.

[Attorneys—*Railton & M.*, and *Willoughby*.]

LANG v. MACKENZIE. Dec. 16.

A., having become bankrupt in August, 1819, wrote, in November, 1826, a letter to B., in which he spoke of a debt of 98*l.* 15*s.*, due from him to B., and said, *inter alia*, as follows: "By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them:—Held, in *indebitatus assumpsit* by B. against A. for the sum mentioned, that the letter contained a sufficient promise to answer a plea of the statute of limitations, and a plea of bankruptcy; and also, that, to render the plea of bankruptcy applicable to the case, it must be shown that the debt existed prior to the bankruptcy.

ASSUMPSIT for goods sold, &c., with the money counts. Pleas—*Non assumpsit*, the statute of limitations, and bankruptcy.

On the part of the plaintiff, a letter written to him by the defendant, dated the 17th of November, 1826, was put in. (a) It stated that, a few days previously, he had *received an application respecting his debt to the plaintiff, *464] of 98*l.* 15*s.*, and that he regretted exceedingly that his embarrassments had prevented his paying it. It then went on to state as follows:—"I am glad to add, that, from the plan of self-denial I have for years adopted, I have the prospect of being soon a free man, and it will be one of the most gratifying incidents of my life, to refund what is due to you. By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them," &c. &c.

(a) The stat. 6 Geo. 4, c. 16, s. 131, enacts—"That no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged, by virtue of such certificate, or any part of any such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized, in writing, by such bankrupt." *Vide also* 9 Geo. 4, c. 14.

Peake, Serjt., for the defendant. The defendant became a bankrupt in the year 1819. The declaration is for goods sold and delivered, and, from what the Court have said in several cases, it is necessary for the plaintiff to have a special count stating the bankruptcy, and the subsequent promise to pay. The law is, that bankruptcy is a total discharge; and there must be a fresh promise to give a cause of action. There was a case last term—

TINDAL, C. J. That was the case of a conditional promise. (a)

Peake, Serjt. I contend, also, that this is not an *absolute, but a [*465 conditional promise. The letter, in substance, is only a statement that, if he shall get his banker's accounts, he will pay. It is for the other side to show that he did. It might be that he acted on the faith of an expectation, that money would be paid in to his account.

[The commission, &c., were put in. The commission was dated in August, 1819, and received the Lord Chancellor's allowance on the 21st of March, 1820. It was not enrolled. (b)]

TINDAL, C. J. At present, the impression on my mind is, that this is not a qualified or conditional promise. It seems to me, that there is no condition made as to the banker's book coming. The promise is separate from that. This being my impression, I will not decide the other point without giving you leave to apply to the Court upon it.

Wilde, Serjt., for the plaintiff. With respect to the bankruptcy, there is nothing to connect the commission with the debt, the letter is written in 1826, and the commission is dated in 1819.

Peake, Serjt. It is admitted on the pleadings.

**Wilde*, Serjt. We could not, to a plea of bankruptcy, reply anything [*466 but the *similiter*.

TINDAL, C. J. I consider it is so. I think the defendant is out of Court upon this point. Verdict for the plaintiff.

Wilde, Serjt., and *Hoggins*, for the plaintiff.

Peake, Serjt., for the defendant.

[Attorneys—*Tatham*, and *Warry*.]

(a) If a bankrupt promise *absolutely* to pay a debt barred by his certificate, *indebitatus assumpsit* lies against him on the original consideration. *Penn v. Bennett*, 4 Camp. 205; *Williams v. Dyde*, *Peake*, 68; *vide* also *Brix v. Braham*, 8 B. Moore, 261; and 1 Bing. 281. But, if a bankrupt only promise *conditionally*, the plaintiff must declare specially, and prove the condition performed. *Penn v. Bennett*, 4 Camp. 205. A bankrupt having obtained his certificate, is not liable to pay a former debt, unless the promise be express, distinct, and unequivocal. *Fleming v. Hayne*, 1 Stark. 370. Therefore, a promise to pay everybody 20s. in the pound, is not sufficient. *Lynbux v. Weightman*, 5 Esp. 198. And, if the promise be to pay when he is able, in *indebitatus assumpsit* brought on that promise, his ability to pay must be shown. *Besford v. Saunders*, 2 H. Bl. 116. *Vide* also *Bailey v. Dillon*, 2 Burr. 736.

(b) By the 6 Geo. 4, c. 16, s. 95, it is enacted (*inter alia*), that "the Lord Chancellor shall be at liberty, from time to time, by writing under his hand, to appoint a proper person, who shall, by himself or his deputy (to be approved by the said Lord Chancellor), enter of record all matters relating to commissions, and have the custody of the entries thereof," &c. And section 96 of the same statute enacts—"That, in all commissions issued after this act shall have taken effect (1st September, 1826), no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any Court of law or equity, unless the same shall have been first so entered of record."

LEAF and Others v. GIBBS. Dec. 17.

When a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the Jury are satisfied that such person, knowing the facts, and being aware of his rights, had consented to waive his objection.

ASSUMPSIT by the plaintiffs as payees of a promissory note.

It appeared that two ladies, one named Gibbs, and the other White, had in-

curring a debt of 200*l.* with the plaintiffs, for goods sold in the way of their business as milliners; and, to secure the payment of the money, it was arranged that promissory notes should be signed by the two above-named ladies, and the defendant and his mother, who were relatives of one of them. The defendant signed, as did also the two ladies, but the mother, on being applied to, refused to sign. The plaintiffs, however, kept the notes, which became due at different times, and sued the defendant on one of them and recovered. It appeared also, that, after the refusal of the defendant's mother to sign the notes, a confidential clerk of the plaintiffs saw a person named Lloyd, who acted for the family in the matter, and told him of it, adding, that the arrangement was, in consequence, incomplete.

*467] *TINDAL, C. J.*, upon this state of facts, intimated that, in his opinion, unless there was something to show acquiescence on the part of the defendant, the plaintiffs were out of Court.

Upon this a letter was put in, written by the defendant to the plaintiffs, after one of the notes had become due, but before the note in question became so, in which he said, that if the plaintiffs made inquiries after a gentleman whom he named, and were satisfied with his respectability, he (the defendant) would give them a bill upon him.

Bompas, Serjt., for the defendant, contended that there was no evidence of any waiver of the objection on his part.

TINDAL, C. J. (in summing up), said—The note appears to have the names of three persons, the defendant, another person named Gibbs, and a person named White. It seems from the evidence of the plaintiffs' witness, that the defendant was told that his mother was to join, and therefore the obtaining of her signature was a condition, which, if not carried into execution, would justify the defendant in withdrawing; and if matters have not been altered since the signing of the note, the defendant will not be liable upon it. But it seems, that, when the first note was due, the defendant offered security for the payment of it. Therefore, as to that first note, if he knew of his mother's refusal to sign, he seems to have waived it. But if he did not know it, then it is not so. There is no specific evidence that the defendant was informed of it, but Lloyd, who acted for the family, was; and it is probable, therefore, that it came to the defendant's knowledge. But he might not be informed, in the first case, of his strict legal rights. The question for your consideration is, whether *the

*468] defendant intended to waive the objection as to all the notes or not. For, if he did, and obtained time in consequence, then he will be liable. If you think that the defendant, knowing all the circumstances, waived the objection, then you will find your verdict for the plaintiffs; if you do not think so, then you will find for the defendant.

Verdict for the defendant.

Storks, Serjt., and *Hutchinson*, for the plaintiffs.

Bompas, Serjt., for the defendant.

[Attorneys—*D. Jones*, and *Fisher & B.*]

*469] **HOVILL and Another v. STEPHENSON and Another. Dec. 11.*

Where the cause of complaint, in an action on a charter-party by the freighters against the owner of a vessel, was, that a full cargo was not taken in, in consequence of arrangements in the stowage varying from those contemplated by the charter-party—it was held, that the plaintiffs were not entitled to recover, as it appeared that one of them and the broker, who managed the business, were present from time to time during the loading, and cognisant of the arrangements, but did not make any objection.

THIS was an action on a charter-party, against the captain and owner of a vessel called the *Vibilia*. The plaintiffs were *Richard and John Hovill*, and the contract (which was not under seal) was with *Hovill and Sons*; and two

other persons afterwards entered into an agreement with them, and obtained an assignment of a share in the profits. (a)

Wilde, Serjt., contended, that the plaintiffs must be nonsuited, upon these grounds of variance from the contract as to the parties interested.

Taddy, Serjt., submitted, that the action was rightly brought in the names of the persons with whom the contract was in fact made. And he called a witness, who proved that the plaintiffs, Richard and John Hovill, carried on business in the name of Hovill and Sons, which was the name of the firm in the lifetime of their father.

TINDAL, C. J. I shall not stop the cause upon this objection. It appears to me, that the contract is made by name with Richard and John Hovill, through the firm of Richard Hovill and Sons; and therefore, though there may be a secret understanding between the plaintiffs and other persons, that the latter were to have an interest in the charter, yet that does not appear to me to be ground of nonsuit. I will however take a note of the objection.

*The cause of complaint in the declaration was, the not taking in a full cargo, according to the terms of the contract. It appeared that a parti- [*470
tion had been erected on the deck, but not in the particular situation in which it was stipulated that it should be; in consequence of which, about seven tons less were able to be stowed away on the deck; and it appeared also, that a quantity of goods were placed in the hold as ballast, previous to the taking in of a quantity of iron; and the plaintiffs contended, that those goods should have been removed to another situation, to make room for other goods; because, after the iron came in, they were not necessary there as ballast. The plaintiffs had between ten and eighteen tons of goods ready for delivery, which could not be taken in, in consequence of these departures from the charter-party. But it was proved, that one of the plaintiffs, and also the broker, was on board from time to time, while the cargo was being taken in, and neither of them made any objection to the mode in which it was being stowed.

TINDAL, C. J. (in summing up), said—This action is brought on a charter-party, against the captain and owner of the ship *Vibilia*; and it is brought for not receiving and taking on board a full cargo of goods; and, in point of evidence, it is limited to that part of the ship, which would have contained about seven tons, being between the spot where the partition actually was, and the spot where the plaintiffs say it ought to have been; and also to sixty tons of goods in the hold, which ought, as the plaintiffs contend, to have been removed when the iron was brought in, because then it was not necessary that they should remain there as ballast. It does not appear that the plaintiffs had more than from ten to eighteen tons of cargo ready to be delivered. But the main question is, whether they are entitled to recover at all. There is evidence that one of the plaintiffs was on board from time to time while the loading was going on; and the broker also was there, who had a duty to perform both towards the plaintiffs and *defendants. It appears to me, that if the plaintiffs intended to insist [*471
that the partition ought to have been in a different place, they should have some request or requisition to that effect; for if they suffered the defendants to go to expense in putting it up there, they cannot now claim damages, because it was not put up according to the strict terms of the contract. The question, therefore, as to this part will be, whether, under the circumstances, the plaintiffs did, by their conduct, induce the defendants to suppose that there was a consent by them to the partition's being put up where it was. And, with respect to the hold, it seems to me, that, if the plaintiffs knew what had been done, in this case, as in the other, they ought to have made some requisition on the subject.

The Jury here stopped his Lordship, and returned a—

Verdict for the defendants.

(a) One of these persons was the broker who had prepared the charter-party, and was the attesting witness to it. On a former trial, he had been objected to as a witness, and the objection allowed at *Nisi Prius*, and afterwards confirmed in *Banc*. He subsequently released his interest.

For a statement of the motion and arguments on this point, see 3 M. & P. 146.

Taddy, Serjt., and *R. V. Richards*, for the plaintiffs.

Wilde, Serjt., and *Wightman*, for the defendants.

[Attorneys—*Pasmore & T.*, and *Cox.*]

GARRARD v. WOOLNER and Another. Dec. 22.

Trustees under a general assignment for the benefit of creditors, refused to allow one of them to sign the deed, on the ground that they had discovered, after the assignment was agreed on, that his claim was founded on an usurious transaction:—Held, that this refusal remitted him to his original rights.

ASSUMPSIT on two bills of exchange for 500*l.* each, drawn by one Loft on, and accepted by, the defendants, for his accommodation, and endorsed by him to the plaintiff.

It appeared that the plaintiff had attended a meeting of the defendants' creditors, and consented, with the other creditors, to a general assignment of their estate to trustees; in consequence of which, a trust deed was prepared; but the trustees refused to permit the plaintiff to sign it, because they discovered, subsequent to the meeting, that his claim was founded on transactions which they considered to be usurious.

*472] **Andrews*, Serjt., and *Hutchinson*, on the part of the plaintiff, relied on this refusal of the trustees as remitting the plaintiff to his original rights.

Taddy, Serjt., and *C. R. Turner*, for the defendants, argued that the plaintiff, having been a party, with the other creditors, to the agreement, and having induced them, by his consent, to enter into it themselves, could not be remitted to his original rights, by the mere refusal of the trustees, though they might have acted improperly; because the trustees were the representatives of the body of the creditors, and elected by them, and there was no fault on the part of the defendants; and neither they nor the other creditors could be remitted to their original rights. They relied on *Cork v. Saunders*, 1 B. & A. 46,(a) and *Tatlock v. Smith*, 6 Bing. 339, 3 M. & P. 676.(b)

*473] **TINDAL*, C. J., was of opinion, that the trustees were the agents of all the parties,(c) and that their refusal was the repudiation of the plaintiff's right to claim under the deed, and had therefore the effect of placing him in his original situation.

The case afterwards went to the Jury on the question of usury, and they found a—
Verdict for the defendants.

(a) A., being insolvent, by agreement, stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next meeting, and that then the property should be divided among them. The insolvent assigned his effects; at the next meeting, several of the creditors, who had signed this instrument, agreed that the business should be carried on by the trustees for a further time:—Held, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent, for a debt existing at the time of the first agreement.

(b) By an agreement between defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees, for the benefit of creditors, and defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on the defendants' business, and paid the creditors 10*s.* in the pound. They then tendered for execution by defendants, a conveyance of all their estate, containing a clause of release, which defendants objected to as insufficient; and refused to execute the conveyance. The instrument not having been executed by all the creditors, a meeting, at which the defendants were called on to execute, was adjourned, that the signature of every creditor might be obtained. Held, that plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants.

(c) They were trustees for the creditors, for the amount of their respective debts; and they were trustees for the defendants, for any surplus which might remain, after the satisfaction of those debts.

Andrews, Serjt., and *Hutchinson*, for the plaintiff.

Taddy, Serjt., and *C. R. Turner*, for the defendants.

[Attorneys—*Hutchinson & I.*, and *Parnther*.]

IN the ensuing Hilary Term, a rule *nisi*, for a new trial, was obtained on the part of the plaintiff, on the ground that improper evidence had been received at the trial; which, after argument, was in Easter Term made absolute.

*COURT OF COMMON PLEAS.

[*474]

SECOND SITTING AT WESTMINSTER, IN HILARY TERM, 1831.

BEFORE MR. JUSTICE GASELEE.

WILSON v. CHISHOLM. Jan. 19.

An agreement, by which A. agrees to "let" premises to B., "on lease" for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease, under which he holds," and "to keep the said stipulations in every respect until the said lease shall be granted, which lease, when required by B., is to be prepared by" A.'s solicitor, but at B.'s expense—is a lease, and not only an agreement for one.

USE and occupation, on the following agreement:—

"Memorandum of agreement, made the 1st day of March, 1826, between John Wilson, of, &c., and Thomas Chisholm, of, &c. Witnesseth, that the said John Wilson doth hereby agree to let the house, No. 17, Guildford Street East, &c., to the said Thomas Chisholm, on lease, for the term of seven years from Lady-day next, at the net rent of 45*l.* per annum, payable quarterly, free and clear of and from all taxes and rates whatsoever, and subject to all the stipulations and covenants that are contained in the original lease, by which the said John Wilson holds the said house and premises, and to keep the said stipulations, in every respect, until the said lease shall be granted, which lease, when required by the said Thomas Chisholm, shall be prepared by the solicitor of the said John Wilson, but at the costs and charges of the said Thomas Chisholm. To all the before-mentioned terms and conditions, the said Thomas Chisholm hereby agrees. In witness, &c." There was a memorandum at the foot of the agreement, commencing—"Mr. Wilson to lay on the water, &c." The original, lease referred to in the agreement was put in and read.

Storks, Serjt., for the defendant. This instrument is not a lease, but merely an agreement for one. It is an *agreement to let on lease for a term of seven years, if the defendant chooses to require it; for the words are— [*475 "which lease, when required by the said Thomas Chisholm, shall be prepared, &c." It is for him to say whether he will have a lease or not; and, if he does not choose to have one, the agreement merely creates a tenancy from year to year. And if the tenancy is of that description, I shall show that it has been put an end to by a notice given before Michaelmas, 1829, to quit at Lady-day, 1830. I shall also further prove, that the key of the house was sent to the plaintiff, and that he put up a bill, for the purpose of letting it, which, I submit, will amount to evidence of a surrender. The cases of *Goodtitle d. Estrick v. Wray*, (a) *Whitehead v. Clifford*, (b) *Thomas v. Cook*, (c) and *Wright &*

(a) 1 T. R. 735. "Words of present contract with an agreement that the lessee should take

*476] Trevezant,^(d) are in favour of *the defendant; and though Poole v. Bentley,^(e) may appear to be in some respects against him, yet that case was decided upon its own peculiar circumstances, and was not intended, as the Court expressly said, to shake the cases which had been previously decided.

GASELEE, J. I will take your facts. I think it is a lease.

It appeared that the notice to quit was not served on the plaintiff himself, but left at his house, with a female servant. The key was taken by the plaintiff, on an understanding that the house should be let for the benefit of whoever might be entitled, according as it should turn out, in point of law, that the agreement amounted to a lease or created a tenancy from year to year only. A bill also was put up by the plaintiff, for the purpose of letting the house.

GASELEE, J. As to the notice to quit, it seems that it was not delivered to the plaintiff himself; if it had been, and he had received it without saying anything, it might have operated against him. But that was not the case, and he *477] might treat it as altogether a nullity. With *respect to the putting up of a bill, for the purpose of letting the house, it will be for the Jury to say, whether that was not done in pursuance of the understanding upon which the key was accepted; and if so, it will not be an answer to the action. I think, upon the whole, that the plaintiff is entitled to a verdict.

Verdict for the plaintiff—22l. 10s., being for half a year's rent, subsequent to the time at which the notice expired.

Mereweather, Serjt., and *Busby*, for the plaintiff.

Storks, Serjt., for the defendant.

[Attorneys—*W. S. Wilson*, and *Swan*.]

possession immediately, and that a lease should be executed in future, operate only as an agreement for a lease, and not as a lease itself."

(b) 5 Taunt. 518. "If a landlord, in the middle of a quarter, accept from his tenant the key of the house demised, under a parol agreement, that, upon her then giving up the possession, the rent shall cease, and she never afterwards occupy the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key."

(c) 2 B. & A. 119, and 2 Stark. 408. "A., being tenant from year to year, underlet the premises to B., and the original landlord, with the assent of A., accepted B. as his tenant, but there was no surrender in writing of A.'s interest. Rent being subsequently in arrear, the landlord distrained on B.'s goods. Held, that these circumstances constituted a valid surrender of A.'s interest by act and operation of law, within the statute of frauds." *Vide Matthews v. Sewell*, 2 J. B. Moore, 262.

(d) 3 C. & P. 441. This case, decided by Lord Wynford (then Chief Justice Best), contains perhaps the clearest and most correct definition of what amounts to a lease, which was ever given. The point it establishes is, that "an agreement between A. B. & C. D., by which A. B. agrees to pay C. D. 140l. a year, in quarterly payments, for a house, garden, &c. (describing the situation), for the term of seven, fourteen, or twenty-one years, at the option of the tenant, the rent to commence from the 1st of January, &c., is a lease, and not merely an agreement for one." *Vide the cases of Colley v. Streeton*, 3 D. & R. 522, and *Pinero v. Judson*, 6 Bing. 206; *S. C.* 3 Moore & Payne, 497.

(e) 12 East, 168, and 2 Camp. 286. "A clause for a future lease does not, of itself, necessarily intend that the instrument must be only an agreement for a lease, if the intention of the parties appear to be otherwise. Therefore, where the terms were, that one thereby agreed to let, and the other agreed to take land for sixty-one years, at a certain rent, for building, and the tenant agreed to lay out 2000l., within four years, in building five or more houses; and, when five houses were covered in, the landlord agreed to grant a lease or leases, which might be for the more convenient underletting an assignment of the leases; but that agreement was to be considered binding, till one, fully prepared, could be produced—the instrument was held to operate as a present lease."

THIRD SITTING AT WESTMINSTER IN HILARY TERM, 1831.

BEFORE MR. JUSTICE GASKLEE.

STOCKEN v. CARTER. Jan. 26.

A police constable is not justified under the stat. 10 Geo. 4, c. 44, s. 7, in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing, is known to be a reputed thief.

THE plaintiff, in his declaration, complained that the defendant, on the 21st of July, 1830, seized him by the collar, and struck him several blows, and pushed him along on the king's highway, &c. Plea—Not guilty.

On the part of the plaintiff, two witnesses were called, from whose evidence it appeared, that, on the day named in the declaration, between 11 and 12 in the morning, a crowd of persons were assembled in front of Apsley-house, the residence of the Duke of Wellington, in expectation *of the arrival of his Majesty, who, it was understood, was going to visit him; that the plaintiff, who, according to their account, had the appearance of a respectable tradesman, was among the spectators; that the defendant, who was an inspector of police, called out—"Ladies and gentlemen, take care of your pockets, you've got pickpockets and thieves here among you;" and immediately pushed the plaintiff with his hand, saying—"You had better be off;" that the plaintiff remonstrated, and said that he was not a thief or a pickpocket; but that the defendant kept pushing him repeatedly, and telling him to be off; that the plaintiff told him his name, and where he lived, to which the defendant replied—"I know you well, I know what you are, and where you live. You had better be off, or I'll put you somewhere, which you won't like;" all the time keeping his hand on his collar; and that, at last, he gave him a violent push into the road. On their cross-examination, they admitted that the plaintiff was, at the time the defendant spoke to him, in conversation with a man, who, on hearing what the defendant said, immediately went away. It appeared, that, in fact, the plaintiff was, as he told the defendant, a furnishing undertaker, residing at Knightsbridge.

On the part of the defendant, six police constables, and two other witnesses, were called, who swore, that the defendant did not touch the plaintiff at all; and Mr. Mayne, one of the police commissioners, proved, that when the plaintiff came to make complaint against the defendant before him, he only charged him with having accused him of being a thief, and did not say anything about any assault upon him. One of the defendant's witnesses also proved, that he knew the person with whom the plaintiff was conversing, to be a reputed thief.

Taddy, Serjt., for the plaintiff. The circumstance of a man's being seen conversing in a crowd with a person whom he does not know, and who turns out afterwards to *be a reputed thief, is no justification of a police officer in charging both with being pickpockets. He ought, on the contrary, [*479 to have warned the plaintiff as to the company he was in. A man cannot, under such circumstances, choose his company, or refuse to listen to any observation which may be made as to the carriages or the king's visit, or on similar subjects. The words of the police act only authorize a policeman to apprehend loose, idle, or disorderly persons disturbing the public peace, or those whom he has just cause to suspect of evil designs, &c. Now the defendant had no just cause to suspect the plaintiff. He might have such cause with respect to the other person with whom the plaintiff was conversing; for I think it would be holding it too strictly, to contend that a policeman is bound to know the facts himself. But the mere circumstance of contiguity in a crowd is not sufficient to justify an officer in supposing a person to have any evil design. It is clear,

that if the plaintiff was pushed off the pavement, with the violence stated by his witnesses, the defendant exceeded his authority. The plaintiff was not obliged to go, he was no thief, and the defendant had no right to make him go. Therefore, if any assault was committed, the plaintiff is entitled to damages. You will have to say, *first*, whether an assault was or was not committed; *480] *and secondly*, if there was an assault, had the defendant any reason to suspect the plaintiff of evil designs. If you think that he certainly had not, then there is no justification of the assault, and you will show, by the damages you give, that the public must be protected against such random acts as that complained of.

GASELEE, J. (in summing up), said:—The material question is, whether any assault was committed. If you think the assault is proved, then you will have to ascertain what damages the plaintiff is entitled to; and in doing this, you may take into consideration the circumstances attending the assault; and if you think it was attended with circumstances of aggravation and insult, you may give such compensation as you think right, for the injury done to the wounded feelings of the plaintiff. If the plaintiff was at the place in question under circumstances which gave the police officer reason to believe that he was there with any evil design, the officer would have been justified in apprehending him. But the defence is not rested upon that ground, the main question made is,—“Was there any assault or not?” There is no evidence of the conversation between the plaintiff and the reputed thief, it might be about the common topics of the day. There are six police officers, who all swear that the defendant never touched the plaintiff at all. There is no doubt that the plaintiff supposed that the defendant intended to charge him with being a pickpocket. It is important to the public that they should be protected in their liberty; and, on the other hand, it is important that the police of the country should be upheld, if they conduct themselves properly. If you find a man making a mistake acting *bonâ fide* (for there is no pretence of any malice in this case), though you may think yourselves bound to give a verdict against him, yet you will not visit him with damages for that which was a mere error. But the material question is as to the assault, which is positively sworn to by two witnesses for *481] the *plaintiff, and as positively denied by six or seven for the defendant.

The Jury retired, and, after several hours' deliberation, returned a verdict for the plaintiff.—Damages, One farthing.

Taddy, Serjt., and *Platt*, for the plaintiff.

Andrews, and *Bompas*, Serjts., for the defendant.

[Attorneys— — — — and — — — —.]

(a) 10 Geo. 4, c. 44, s. 7, enacts—“That it shall be lawful for any man, belonging to the said Police Force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons whom he shall find between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail in the manner hereinafter mentioned.”

ADJOURNED SITTINGS AT WESTMINSTER, AFTER HILARY TERM,
1831.

BEFORE LORD CHIEF JUSTICE TINDAL.

THURGOOD v. RICHARDSON and Another. Feb. 5.

In an action by a landlord against a sheriff, for removing, under an execution, the goods of his tenant, without securing the payment of a year's rent, as required by the statute 8 Anne, c. 14, the tenant was called to prove the rent due, and objected to as interested, and released by the landlord:—Held, that this release could not be pleaded in bar of the action *quis dar rein continuance*, nor did it reduce the landlord to the necessity of taking a verdict against the sheriff for nominal damages only.

The statute 8 Anne, c. 14, s. 1, applies to goods in *apartments being parcel of a messuage*.

THE first count of the declaration stated, that, on the 25th of March, 1830, and for a long space, to wit, the space of one year then last past, one John Perry held, used, occupied, and enjoyed, certain rooms and apartments, and premises, *in and parcel of a certain messuage* or dwelling-house, with the appurtenances, in the parish of St. Pancras, as tenant to the plaintiff, at a certain rent, and that a large sum of money, to wit, the sum of 36*l.*, for and on account of such rent, for a long time, to wit, for one year, of the said tenancy, which ended on that day, became and was due and payable, and still continued in arrear and unpaid, and that, while it was so in arrear, to wit, on the 7th of May, 1830, the defendants, then being *Sheriff of Middlesex, by virtue and under pretence of [*482 a writ of *fi. fa.*, at the suit of one G. H. Mitchelmore, took the goods and chattels of the said John Perry, then being in the said room and apartments and premises, &c., to a large amount, to wit, beyond the amount of the said arrears of rent so due and owing, &c., that is to say, to the amount of 40*l.* It then went on to state, that, after the taking, and before the removal of the goods, the plaintiff gave notice to the defendants of the rent so being due and in arrear, and requested that he might be paid it, before the goods or any part thereof were removed. Yet the defendants, well knowing the premises, but not regarding the duty of their office, nor the statute in such case made and provided, (a) but contriving, &c., to deceive and defraud the plaintiff of the rent and of his remedy for the recovery of it, under colour of the said writ, wrongfully, injuriously, and deceitfully, removed and carried them away, contrary to the form of the statute, without paying the plaintiff the said rent or any part thereof. The *count concluded with an averment that no part of the rent had been since [*483 paid, but the whole remained in arrear; whereby the plaintiff was deprived of the benefit of a distress for the recovery of it, and was in great danger of losing it. The second count was in trover for goods of the value of 50*l.* Plea—The general issue.

An examined copy of the *fi. fa.*, &c., at the suit of Mitchelmore, endorsed to levy of Perry's goods 42*l.* 6*s.*, was put in, with the sheriff's return, that he had levied 11*l.* 2*s.*, of which 6*l.* 5*s.* was paid to Mitchelmore.

(a) By the 8 Anne, c. 14, s. 1, it is enacted—"That, from and after the first day of May, which shall be in the year of our Lord 1710, no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution, on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises, at the time of the taking such goods or chattels by virtue of such execution; Provided the said arrears of rent do not amount to more than one year's rent; and, in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

Perry was called as a witness, for the purpose of proving that the rent was in arrear, and that notice of that fact had been given to the sheriff's officers.

E. Lawes, Serjt., objected, that the witness was not competent. He is come to pay his own rent out of the sheriff's pocket.

Andrews, Serjt., and *Platt*, for the plaintiff, contended, that the witness stood indifferent between the parties.

TINDAL, C. J., said, he thought there had been a case decided, very nearly similar; but inquired of the plaintiff's counsel, whether they were in a situation to get rid of the objection. (a)

*484] They replied that they were, and the plaintiff, being in Court, executed a release to the tenant.

Upon this, *E. Lawes*, Serjt., for the defendants, submitted, that the release being executed, no rent could be said to be due; and as the action was brought for the purpose of recovering the rent, the release might be pleaded *puis darrein continuance*.

TINDAL, C. J., was of opinion that the objection was not tenable, but said that he would take a note of it.

The witness then proved, that his arrears of rent amounted to 36*l.*, being for one year, and that he was on the premises when the sheriff's officer came in; and that the landlord came in immediately after; that the sheriff's officer and his assistant were both told that there was 36*l.* due, for a year's rent; that the value of his (the tenant's) goods was about 40*l.*; and that there were things on the premises belonging to the landlord, such as shop-fittings, which, it appeared, were taken away and sold. It appeared also, that the landlord sent in a person to distrain for his rent; but the goods were, notwithstanding, removed under the execution.

E. Lawes, Serjt. The landlord can only complain, on the ground that his remedy by distress has been taken away by the removal of the goods; he cannot complain of the severance of the shop-fittings. And as to the amount of the damages, he can only, in any view of the subject, claim the sum of 11*l.* 2*s.*, which was the fair and proper price of the goods after they were severed.

*485] TINDAL, C. J. (in summing up), said—This is an action *brought by Mr. Thurgood, the landlord, for the injury brought on him by the sheriff, in not complying with the act of parliament, requiring the payment of rent not exceeding a year's. The act prevents the sheriff from removing the goods unless he has satisfied the landlord's claim. It seems that the sum of 36*l.* was due. The landlord, of course, could not recover this against the sheriff, without having given him some notice. But there is evidence here, that notice was given to the officers, and a person attended afterwards to levy a distress. This was very efficient notice, and shows that the landlord insisted on his right. The question is, what damage has the plaintiff sustained in consequence of this; what compensation is he entitled to, for being put in so much worse a condition than he otherwise would have been in? Now, if he, provided the goods had remained, and his distress had gone on, could have sold them so as to produce the amount of rent due, that will be the measure of the damages. The measure of damages will be the value of the goods to him, if he had been allowed to proceed with his distress, and had sold them. An objection has been made, by the learned counsel for the defendants, that no damages at all can be recovered, on account of the release. It would certainly be a little hard, if, after an objection taken to the competency of the tenant, which the landlord had done all he could to remove, it should be turned round upon him, in a

(a) The case of *Keighley v. Birch*, 3 Camp. 521, is an authority to show, that, in an action against the sheriff, for an improper return to a *f. fa.*, stating that he had paid a sum of money to the landlord for arrears of rent, the landlord is not a competent witness on the part of the sheriff, to prove that the rent was, in fact, due. This decision was given by Lord Ellenborough, and proceeded on the ground, that, if the action against the sheriff succeeded, the landlord would be liable in an action by the sheriff, in which the judgment in the first action would be evidence of special damage. In that case, the tenant was examined as a witness on the part of the plaintiff, the execution creditor, and swore that no rent was due at the time of the execution.

much stronger shape, and he should be told,—“Now your damages are gone altogether.” It seems to me to be a little unreasonable, and, as far as I can see my way, it is not any conclusion which the law will sanction. It seems that the party was tenant from year to year; therefore the landlord must have done something to convert the goods into money; he could not keep them to let to another, as he might if the tenancy had been at an end. You are not bound, in giving your verdict, to confine yourself to the sum of 11*l.* 2*s.*, which the goods actually *produced. You are to judge for yourselves, and may, [*486 if you please, give something more.

Verdict for the plaintiff. Damages—30*l.*, with leave to move to enter a verdict for nominal damages, on the point as to the effect of the release.

Andrews, Serjt., and *Platt*, for the plaintiff.

E. Lawes, Serjt., for the defendant.

[Attorneys—*Platts*, and *Nicholson*.]

In the following Term, *E. Lawes*, Serjt., moved pursuant to the leave given, but the Court refused him a rule.

He then moved in arrest of judgment, on the ground that the statute did not apply to apartments, being part only of a messuage; but the Court were of opinion against him on this point also.

HADDAN v. MILLS, Gent., One, &c. Feb. 5.

In an action for arresting a party and holding him to bail, without a reasonable or probable cause; whatever was admissible in evidence to defeat the action on which the arrest took place is also admissible on the question of the right of the party arrested to recover for the injury sustained.

THIS was an action for arresting the plaintiff, and holding him to bail, without reasonable or probable cause, &c.

It appeared, that, on the 3d of December, 1829, Haddan was arrested by Mills, on a bill of exchange, for 50*l.*, which was drawn by one Righy, and accepted by Haddan, and became due in the month of March, 1827. The action proceeded to trial, and Haddan obtained a verdict. (a)

*A witness, named Green, was examined, who stated, that he called upon Mills, at least a year before, and told him, that he came from Mr. [*487 Haddan, respecting a bill for 50*l.*, drawn on him by Righy; and that Mr. Haddan wished to know whether he (Mills) had it in his possession. Mills showed him the bill with Righy's name endorsed. The witness told him, that Mr. Haddan was very much surprised, as the bill had been a long time over due, and not hearing before, he supposed it had been destroyed; adding, that it was an accommodation bill. Mills said, an acceptor was always liable to pay his bills. The witness replied, that Righy owed Haddan a considerable sum, and he was very much surprised that the bill should be in Mills's hands, and asked him how he came by it. Mills said, *a friend of Mr. Righy's had put it into his hands, to get the money for it. The witness asked for time to pay it.* Mills said he should have no objection to accommodate Haddan, if he would give him security. The witness said, he would inform Haddan and let Mills know; and accordingly he

(a) The formal proof, by which these facts were made out, consisted of an examined copy of a writ of attachment of privilege, by Mills against Haddan, endorsed—Bail on oath, for 5*l.* 10*s.*, and upwards, &c., with the sheriff's return of *cepi corpus*, and the warrant from the sheriff's office granted upon it; evidence of the circumstances of the arrest by the officer who made it; the bail-bond itself; an examined copy of the record in the original action, and evidence of the amount paid for the bail-bond, &c., and of the amount of extra costs not allowed on taxation.

did so, and went again to Mills about three weeks or a month after, and asked him if he had any objection to take a couple of bills of Haddan, on other persons, at six and nine months. He said he should have no objection, but should like to see Mr. Haddan himself.

The two new bills were put in, they were for 25*l.* each. They were accepted by the witness. The witness stated that he accepted them in consequence of the arrangement; that he was called on to pay the first, which became due on the 4th of December; that he sent 15*l.*, in part, to the office of Mills, on the morning after it was presented, and the remaining 10*l.* some time after, on receiving *488] a letter *demanding it. The second bill, which was at nine months, was presented for payment on the evening of the day of the trial of Mills *v.* Haddan, and the witness refused to pay it, having had notice to that effect. [The 50*l.* bill was then put in, it was dated the 1st of January, 1827, and drawn at two months after date.] The witness stated, that the bill had been over-due twelve months, when he first went to Mills. On his cross-examination, he admitted, that he might have said on the former trial that *Mills stated he had given money for the bill* to a friend of Righy's; and he allowed that Haddan had occasionally been in trials, troubles, and embarrassments, arising from his good-nature. On his re-examination, he said, that Mills seemed to know that Righy had run away from his creditors, and was gone abroad.

A brother of Haddan was then called, and stated that he saw Righy at the latter end of July, 1827; the 50*l.* bill having become due, in the month of March previous; that he then saw the bill in his possession, without any endorsement upon it, and had some conversation with him about it.

Wilde, Serjt., proposed to ask the particulars of the conversation, Righy being the holder of the bill unendorsed after it had become due.

Storks, Serjt., objected.

TINDAL, C. J. You derive title under this party, and what he says is evidence against you.

Storks, Serjt. It might be received in an action upon the bill, but cannot in this action, which is for a malicious arrest. The learned Serjeant referred to the case of Barough *v.* White, 4 B. & C. 325, 6 D. & R. 379, and 2 C. & P. 8.; and Smith *v.* De Wruitz, R. & M. 212.

*489] *Kelly*, on the same side. The question is, whether this evidence is admissible in an action for malicious arrest. It might be evidence to prevent a recovery on the bill. But there is the record, upon that part of the case, for evidence in the present action. The question here is, as to malice or want of probable cause; and nothing passing in the absence of the defendant can be evidence upon that question.

TINDAL, C. J. It is a very difficult thing, to draw that distinction. It is the same question, only the parties are reversed. I do not exactly see the ground of distinction.

Kelly. The ground of distinction is, that in the action on the bill, the rule applies, that a person taking a bill after it has become due, takes it subject to the objections to it, and therefore such declaration may be evidence.

Wilde, Serjt., *contrd.* It is not enough to put in the judgment. The universal practice is, to go into the facts of the cause. Whatever was good evidence in the action on the bill, is equally good evidence here on the question of the party's right to recover. The judgment shows no right of action, but might have proceeded on a variety of grounds.

TINDAL, C. J. The judgment alone would not be sufficient. I think that what was admissible in the action on the bill, is admissible also in the present action.

The witness then stated, that Righy said that the bill had been accepted by Haddan, for his accommodation; but, on being asked to produce it, said that he could not find it.

Storks, Serjt., for the defendant. It is said, that the two bills were substituted.

ted for the other, and that we had no *right to arrest on the first bill. There is no proof when the two bills came into our hands, whether we had them before the arrest or not. They were bound to prove that we had them before. As to the other part of the case, it contradicts itself; if they had the defence they rely on, why did they not insist upon it, and not offer the two other bills? It is not the course for people to discount bills after they become due. It is not conformable to knowledge of the law, nor consistent with commercial experience.

TINDAL, C. J. (in summing up), said—The question you have to try is, whether the present plaintiff, Haddan, was arrested and held to bail, when the defendant knew, at the time, that there was no reasonable or probable cause for the action. The grounds on which Haddan seeks to maintain the present action are two: the *first* is, that Mills held him to bail on a bill which he had accepted for the accommodation of Righy, and that this bill never came into Mills's possession till long after it became due. Undoubtedly, if Mills took the bill when it was over due, there was the same right of defence against him, as there would have been against the original party; and Mills, therefore, would have no reasonable or probable cause. The *second* ground of defence is, that, before the arrest, which was on the 3d of December, some time before (but it is left very uncertain on the evidence when), Mills had received two bills for 25*l.* each, instead of the one bill for 50*l.*; and undoubtedly if he did receive them in the mode which the witness has stated, provided you are satisfied they came to his hands before the arrest, he cannot make any defence to this action, because he could have no right to recur to the original bill, if he had, as a consideration for giving time, taken two other bills instead of it. With respect to the damages, if you find your verdict for the plaintiff, you may give him the amount of the extra costs not allowed in taxation, and some moderate compensation for the trouble and anxiety occasioned by the action. *With regard to the first point, it appears that the 50*l.* bill became due in the month of March, 1827, and the arrest did not take place till so long after as the 3d of December, 1829. The plaintiff's brother says, that the bill in July 1827, was in Righy's possession without any endorsement whatever. It is for you to say, whether you believe this or not. The witness Green says, that, about a year ago, Mills showed him the bill with Righy's endorsement on it; now, if the former witness is correct, this endorsement must have been put on long after it ceased to be a negotiable instrument. One observation to be made on this evidence is, that the first demand on Haddan was made about a year ago. Mills's case is, that he obtained the bill while it was running, and yet no demand was made till so long after. On the other hand, the question will be, whether Haddan knew, when he gave the two new bills, that Mills had received the other bill, after it became due; because, if he did, it would be a strong answer to the supposition that it was an accommodation transaction at all. As to the second point, it appears to me, that it is not brought home to the defendant with sufficient accuracy; at least I should think you will pause before you will decide upon that ground. The question is, whether you think that Mills had actually got these two bills in his possession before the day of the arrest. It seems that they bear date the 1st of June, 1829; and the first, which is at six months, became due upon the 4th of December. There is no evidence on the part of the plaintiff, as to when they were delivered. I do not see how you can find your way to a verdict for the plaintiff on the second point, unless you are satisfied that the bills found their way into the defendant's possession before the first bill became due, or rather, before the 3d of December, the day of the arrest. These are the two propositions; upon finding the affirmative of either of which, I tell you that the defendant had not reasonable or probable cause. If you think either of them is proved, then you will find *for the plaintiff; if you think neither of them is, then you will find for the defendant.

Verdict for the plaintiff. Damages—75*l.*

Wille, and *Russell*, Serjts., and *Platt*, for the plaintiff.
Storks, Serjt., and *Kelly*, for the defendant.

[Attorneys—*Harvey & Co.*, and *Mills*.]

MOLLOY v. DELVES. Feb. 7.

In an action by the endorsee against the acceptor of a bill of exchange, it is no objection to the plaintiff's right of recovery, that the acceptance actually took place before the drawer's name was signed; although the declaration be in the usual form, *viz.* that the bill being drawn, the defendant *afterwards* accepted, and that the transaction was according to the custom of merchants. And it is not necessary that the plaintiff, in such action should offer any evidence, to show that it is the custom of merchants so to transact business.

ASSUMPSIT on a bill of exchange by the endorsee against the acceptor. The declaration was in the usual form.

It appeared that the bill had been accepted by the defendant, before the drawer had signed his name to it.

E. Lawes, Serjt., for the defendant, objected, that, under these circumstances, the plaintiff could not recover, on the ground of variance. The bill was not drawn according to the custom of merchants.

Jones, Serjt., *contrd.* The declaration states it in the ordinary way, as a request by the drawer on the drawee to pay, and that is made out.

TINDAL, C. J. There is nothing but the word *afterwards* that can create any doubt. It seems that the acceptor has the bill in blank, and the question is, whether he does not afterwards adopt it. I think the plaintiff is entitled to a verdict, but I will give leave for a motion to the Court, for a nonsuit, if, on looking into the cases, it shall appear that there is anything in the objection.

*498] *E. Lawes*, Serjt. I submit that the plaintiff must give *proof that the bill was drawn according to the custom of merchants.

TINDAL, C. J. I think that what is proved is sufficient, unless any case is shown me to the contrary. The bill is proved to have been, after it was accepted, in the hands of the present plaintiff.

Verdict for the plaintiff—33*l.* 8*s.* 6*d.*

Jones, Serjt., and *Evans*, for the plaintiff.

E. Lawes, Serjt., for the defendant.

[Attorneys—*Molloy*, and *Broughton*.]

In the ensuing Easter Term, *E. Lawes*, Serjt., mentioned the case, pursuant to the leave given at the trial, and said, that no previous case had decided the precise question; but admitted, that there were cases which it was difficult to distinguish upon principle from that before the Court. Rule refused.

Vide Collis v. Emmett, 1 H. Bl. 313.

*ADJOURNED SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1831. [*494]

BEFORE MR. JUSTICE ALDERSON.

(*Who sat for the Lord Chief Justice.*)

WINTER v. HENN. Feb. 10.

In an action for criminal conversation, the plaintiff will be entitled to a verdict, unless he has been in some degree a party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society.

CRIM. CON. The plaintiff, better known by the name of Spring, the boxer, and champion of the English prize ring, kept the Castle Tavern, in Holborn, and the defendant was a hatter, carrying on business in that neighbourhood. The plaintiff and his wife were married at Hereford, in the year 1821, and then came to London, and lived for two years in London, keeping the Weymouth Arms; after this, they returned to Hereford, and kept the Booth Hall Inn, there, for about three years, and then came to London again, where they continued to reside; and according to the evidence of a brother and sister-in-law of the plaintiff, and two or three other witnesses, at each of these places lived very happily together. But it appeared, that the wife went to live with her father for a time while they were at Hereford, in consequence of some disagreement; but the witness who proved this, denied that he had any recollection of her being turned out of doors by her husband, for being too intimate with a gentleman. It also appeared, that he had, in London, pushed another gentleman out of the house, and said that he had put him under the pump because he was too fond of his wife. With respect to the elopement, it did not appear with whom, if with any one, Mrs. Winter left her husband's house, but it was proved, that, on the 27th of August, 1830, the defendant called at the Mulberry Tree public-house at Stepney, between 10 and 11 in the morning, and ordered some *refreshment, and said that he expected a lady would be with him in about an hour. About that time he came again and the [*495] plaintiff's wife with him in a gig, they dined at the house. Towards evening, the weather became very wet, and they went, as they said, to a friend's house, but returned, saying the house was so full they could not sleep there. After some difficulty, they were allowed to sleep at the Mulberry Tree, the defendant saying of the plaintiff's wife—"She is a married lady and will put up with anything, she will sleep in the children's bed." They slept together that night, and the plaintiff's wife remained there till the 8th of September, the defendant coming and being with her for some time every day, in the bed-room, but not sleeping with her after the first night. The day before she left the Mulberry Tree, the plaintiff came there in a gig, with a gentleman. She came down, and seeing him, said—"Hullo, Winter, what brought you here?" He made no reply, but remained an hour in the house, and then went away.

Taddy, Serjt., for the defendant. The plaintiff is to have compensation for what he has lost, and if he has lost nothing, he is entitled to nothing. It goes not only to the damages, but to the action; because the ground of the action is, the loss of comfort and assistance.

On the part of the defendant, a letter written by the plaintiff to his wife, was put in and read. It was dated July 26th, and was as follows:—

"After receiving your farewell letter, I was rather surprised at receiving another from you. As far as regards your seeking that kindness from strangers, which I deny you, you sought their favours when you had me to fly to, therefore

I do not wonder at your doing so now. You say, you will bid adieu to England and deception; had you bid adieu to deception, you would not have been now in *496] a *situation to bid adieu to England. But whosoever may be the partner of your flight, I hope he will make you more happy than I have been for a long time, or ever shall be. You say I had been too hasty in forming conclusions as to your conduct. I cannot have been very hasty about it. It is now more than five years since I found you out at Hereford, besides many since, and now I can hear of many before. That does not seem very hasty, for I was in hopes you would see it before it was too late. Unhappily for you and me, you seem to think the only thing you have done wrong is leaving your home. That was entirely wrong, but when you had an appointment you never broke your word. I do not wonder at your not going to Hancock's when you left home, as the big house in Soho Square is nearer and much more suitable for the purpose. You know the rules better than I do. You say that you have no money; what business has your father with the money? You committed the robbery, and should not, by him, be deprived of the plunder. Was I ever so inclined to send you anything, you prevent me doing so. I could not send it in a letter, nor would I send it to that infamous old hag at the building, where I know you do not live, nor have not for so long a time. As for your mother's rings, I do not know where to find them, or I would send them, however unworthy you may be of such a mother. Were she alive now, to see her daughter in such a situation, she would say, you are unworthy of her knowledge. The reason you give in not meeting your uncle tells me very plain what your feelings are, as to me personally, only for pecuniary feelings; or, had you ever wished to have seen me again, I should have thought there could not have been a better or more proper opportunity than to have seen me in the presence of your uncle; but I assure you that it was not intended either by him or me that I should be there. You begged of me to allow you to explain yourself, but, to my great surprise, *497] you have never *attempted it. As yet, you say, you are living in seclusion, but I know more than you wish. I am sure, if you had ever wished to have seen me again, you should not have kept one thing from me whether it was for or against yourself; but of many questions you answered two, but not accounted where you slept, or where you have been since you have left the buildings; though was I so inclined, I could walk from my door to where you are, blindfolded almost. I should like to know, if your father have got the greatest part of your money, and he only sent you 10s., how you live and pay rent. But I suppose your hackney coach friend provides you with all you want. Postscript. I find you are as fond of hackney coach friends now, as you used to be formerly of a stage coach friend; all the difference is, that you used to go and see him, this comes to see you."

Wilde, Serjt., in reply. No topics have been urged for the defendant, which make the duty of the plaintiff's counsel at all painful. There is nothing which reflects disgrace upon the plaintiff. As far as good conduct and good feeling are concerned, he stands without exception. The letter produced was written at a period the most improper to be selected. It was written in answer to a letter sent by the guilty wife, to induce him either to take her back, or to give her pecuniary assistance. It was written under the influence of wounded feelings, at a time when she had left her home, as he thought, for ever. People, at such a time, pour in their accounts of all that they have heard about the wife; and, taking the whole letter together, it proves not that the plaintiff had found out and knew of himself the facts, but that others had just then told him of them. His conduct in the transaction as to the pump was quite proper; according to the evidence, it only appears that the gentleman was fond of his wife, and not *498] that he had ever been intimate with her. If the facts in the *letter were true to the plaintiff's knowledge, they might have been proved. If her general conduct had been bad, they might have called many witnesses to prove it so. It does not, as is said on the part of the defendant, go to the action. The misconduct of the wife will not entitle the defendant to a verdict, unless

indeed the husband assented to it; and there is no pretence for that in this case.

ALDERSON, J. (in summing up), said—There are two questions in this case:—*First*, whether the defendant is entitled to the verdict or not; and, *secondly*, if he is not, and the plaintiff is; then, what amount of damages ought to be given. I apprehend the law to be that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict. With respect to damages, if you are of opinion that the plaintiff's wife would be of no service, but, on the contrary, a disservice to himself and his children, in that case, a small amount of damages will be sufficient. From the letter, it does not seem that the plaintiff has misconducted himself. And it does not appear to me, that any amount of damages, however small, will be any reflection upon him; because, though he has conducted himself with the utmost propriety, yet he may have lost a wife who was worth nothing. In the letter, he speaks about having found her out at Hereford, five years ago; and it seemed, from the way in which the brother gave his evidence, that he also had heard something about it. There is a part of this letter which may also be material for you, when you are considering *whether the plaintiff had, at the time when he wrote it, [*499 and before the adultery with the defendant, permanently given up all intention of living with his wife; because, if he had, it seems to me (and if I am wrong I may be set right hereafter), that he cannot set up the loss of what he had voluntarily relinquished as the ground of a claim for compensation. If you think that this letter was a permanent giving up of the society of his wife, before the act of adultery with the defendant, then you will find your verdict for the defendant; if you do not think so, then you will find your verdict for the plaintiff, with such damages as you think a person who has written such a letter is entitled to claim from a Jury of the country, for the loss of his wife.

Verdict for the plaintiff. Damages—150*l*.

Wilde, and Jones, Serjts., and Justice, for the plaintiff.

Taddy, Serjt., and C. Phillips, for the defendant.

[Attorneys— ——— and ———.]

CALCRAFT, Esq., v. The Earl of HARBOROUGH.

Held, in an action for criminal conversation, it was not matter of defence, but only in mitigation of damages, that the plaintiff having married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.

CRIM. CON. The plaintiff was a captain in the army, who, on the 10th of November, 1829, was married to Miss Emma Love, the actress, who, at the time, was living with her mother in Burton Crescent. The marriage took place at St. Pancras Church, without the knowledge of the mother, the lady being attended only by her maid servant. After the ceremony, the plaintiff walked with his wife as far as Burton Street, on her way home, and then left her to go into the country on military duty, according to *previous arrangement. He [*500 returned to London for a few days, about five weeks after, and visited her for a short time, and he also visited her when she was at Bristol. In the month of July, 1829, Mrs. Love and her daughter went to Nottingham for theatrical purposes, and put up at the Black's Head Inn, where they arrived on a Tuesday. On the following Saturday, the defendant, Lord Harborough, who, it appeared,

had been a visiter at Mrs. Love's house in London, and had made presents to her daughter, came to the Inn, and Mrs. Love and her daughter dined with him in his room. In the evening of that day, Mrs. Calcraft directed her maid to pack up a box for her, but without assigning any reason. Soon after, she was missed, and it was subsequently ascertained, that she went with the defendant, in his carriage, to his seat in the neighbourhood, where she remained with him for a considerable time, and was delivered of a child. The female servant who proved these facts said, that the plaintiff and his wife seemed very fond of each other, he seemed very attentive, and she was very kind. It appeared that Mrs. Love was not made acquainted with her daughter's marriage previous to the elopement with the defendant; and that Mrs. Calcraft continued to perform as usual at the theatre, in her maiden name. Some of her letters, written to her husband when he was absent, on duty, were read, to show her affection for him. One of them commenced as follows:—"With great heaviness of heart, *my ever dearest Granby*, I sit down to write, &c., &c." It appeared, that, on two occasions after the marriage, the plaintiff and the defendant were in Mrs. Love's house together, but in different rooms.

Taddy, Serjt., for the defendant. The Courts, in modern times, have held, that the very foundation of an action of this kind is the loss of the comfort, fellowship, and assistance of the wife. Now, trying the question by this test, *501] has the plaintiff, in this case, entitled *himself to maintain this action? What comfort, fellowship, or assistance has he lost? The marriage was never communicated to Mrs. Love. If it actually took place, or if the plaintiff meant to treat the lady as his wife, what possible reason could there be for this? The female servant was trusted; and why should not the mother have been trusted also? The mother could have no reason for discouraging the attentions of Lord Harborough, or any other man, as she did not know that her daughter was a married woman. The plaintiff left his wife in London, exposed to the attractions and temptations of a theatre, without giving her the protection of her mother's counsel; and what right has he to ask for damages under such circumstances? I submit, with confidence, that this is not the sort of legitimate connexion which the laws of this land are intended to protect. It is a spurious kind of connexion, in which the husband takes all the advantage of personal gratification, without incurring any of the disadvantages of acknowledging his wife publicly.

TINDAL, C. J. (in summing up), said—The marriage has been proved, and it may fairly be inferred from the evidence that the adulterous intercourse has taken place; the only question, therefore, is a question of damages. Cases of this description vary very much. There certainly appears in this case to have been less of that intercourse between husband and wife, to compensate for the loss of which suits of this description are instituted, than I ever met with in any case before. You may consider, in estimating the damages, how far the plaintiff interfered to protect his wife from the temptations to which, by her profession, she was exposed. You may also consider whether the defendant knew that she was a married woman, or might conclude that she was still single, and attending as an actress at the theatre. It seems that he had visited her before the plaintiff had any acquaintance with her, and had made her presents; and, what is *502] singular enough, he was *allowed to visit her at her mother's house after the marriage; and what struck me very much was, the impropriety of both parties being allowed to be in the house at one time, in different rooms. Looking at the description of the injured party, looking to the degree of affection or attachment that can be supposed to have existed between the parties, and looking also at the conduct of the defendant, it is for you to say what damages, under such circumstances, the husband is entitled to.

Verdict for the plaintiff. Damages—100*l*.

Denman, A. G., *Andrews*, Serjt., and *Busby*, for the plaintiff.

Taddy, *Wilde*, and *V. Lawes*, Serjts., for the defendant.

[Attorneys—*W. Lake*, and *Tennant & Co.*]

ADJOURNED SITTINGS, IN LONDON, AFTER HILARY TERM, 1831.

EYRE v. NORSWORTHY. Feb. 15.

A captain of a ship is not justified in throwing a stone at a person in a boat, who has fastened it to the ship, and thereby impeded and endangered it, for the purpose of making him let go, unless it was not possible either at the time or before the immediate pinch of the danger, to adopt any other mode for the purpose.

THE declaration stated, that the defendant, on the 12th July, 1830, assaulted the plaintiff, and, "with great force and violence, cast and threw to, at, and against the plaintiff, a certain stone and missile, and thereby and therewith gave and struck the plaintiff a violent blow on his face, forehead, and head, and grievously lacerated, bruised, and wounded the plaintiff, in and upon his face, forehead, and head, and then and there gave and struck the *plaintiff a great many other violent blows and strokes, and knocked him down, &c." [*503 The second count charged the defendant with having beat, bruised, wounded, lacerated, and ill-treated the plaintiff.

The defendant pleaded, first, not guilty, and then, two special pleas,(a) jus-

(a) These pleas being of rather a novel description, and not to be found in the printed collections, we have thought right to insert them here—

And for further plea in this behalf, as to the assaulting the plaintiff, in the said first count of the declaration mentioned, and casting and throwing to, at, and against him, the said stone and missile in that count also mentioned, and thereby giving and hitting him the said blow in the said first count mentioned, and lacerating, bruising, and wounding him, and knocking him down, as in that count mentioned, by the defendant above supposed to have been done, he, the defendant, by leave of the Court here to him for this purpose first granted, according to the form of the statute in such case made and provided, says, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that, before and at the said time when, &c., in the said first count mentioned, he, the defendant, was the master and commander of a certain large ship or vessel, called the John, which ship or vessel was then sailing and proceeding in the river Thames, on a certain voyage from Manilla, in parts beyond the seas, to the port of London. And the defendant further says, that, just before the said time when, &c., in the said first count mentioned, to wit, on the day and year in that count mentioned, the plaintiff wrongfully and unlawfully, without the license or consent, and against the will of the defendant, fastened and attached a certain boat, in which he the plaintiff then was, to the stern of the said ship or vessel, by a certain rope, whereby the progress of the said ship or vessel was not only greatly retarded and impeded, but, owing to the state of the wind, and of the current and tide of and in the said river Thames, the safety of the said ship was greatly endangered. And the defendant further says, that he, before the said time when, &c., repeatedly civilly requested the plaintiff to loose, detach, and cast off the said boat from the said ship, which the plaintiff refused to do. And the defendant further says, that, by reason of the height of the said ship, and of her then being under weigh, and sailing and proceeding rapidly in the said river, on her said voyage, the rope whereby the said boat was fastened and attached to the said ship, could not be reached so as to have enabled the defendant or any other mariners or persons on board the said ship to unloose or cut the same, nor could the plaintiff, or the said boat, or the rope by which the same was fastened and attached to the said ship, be reached, so as to have enabled the defendant, or any of the crew, or mariners or persons on board the said ship, to detach and cast off the said boat from the said ship, nor had the defendant any means of causing the plaintiff to loosen or detach the said boat from the said ship, but by casting or throwing some missile, at or against him. And the plaintiff having so refused, and continuing to refuse, to loosen, detach, or cast off the said boat from the said ship, he, the defendant, in order to cause the plaintiff to loosen, detach, and cast off the said boat from the said ship, at the said time when, &c., cast, flung, and threw the said stone in the said first count mentioned, being a stone of moderate size, at and against the plaintiff, as he lawfully might, for the cause aforesaid. And he further says, that if the said plaintiff was cut, wounded, bruised, lacerated, or knocked down by the said stone, it was occasioned by his so wrongfully and unlawfully fastening and attaching, and continuing fastened and attached, the said boat to the said ship, and refusing to loosen, detach, or cast off the same from the said ship, although so requested so to do, and on the necessary endeavour to cause the said plaintiff to loosen, detach, and cast off the said boat from the said ship, which are the same supposed assaults and trespasses in the introduction of this plea mentioned, and whereof the plaintiff has above thereof complained against him; without this, that he the said defendant was or is guilty of the assaults and trespasses aforesaid, at London aforesaid, in the parish of St. Mary-le-bow, in the ward of Cheap, or elsewhere than in the river Thames aforesaid; and this he, the said defendant, is ready to verify: wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof, against him, &c. And for a further

- *504] tifying the throwing of the stone as a *necessary act to cause the plaintiff to loosen a boat of his, which he had fastened to a ship of which
 *505] the defendant *was captain, and which was impeded in its progress up
 *506] the river Thames, and exposed to risk and danger in *consequence of the plaintiff's boat being so fastened to it. Replication—*De injuriâ*.

It appeared, that, on the 12th of July, a ship, called the John, of 464 tons (of which the defendant was master), was coming up the river Thames to St. Katherine's Docks laden, and towed by a steamer, when several boats, the plaintiff's among the number, were fastened to the stern of the vessel, for the purpose of getting conveyed expeditiously along. The defendant, finding that the progress of the vessel was retarded, and that the boats caused it to sway, and prevented it from answering the helm properly, and fearing that the effect would be the running it ashore, ordered the persons in the boats to disengage them, and, for the purpose of compelling them to do so, threw from the ship a stone, which struck the plaintiff on the head, and wounded him. There was contradictory evidence as to the conduct both of the plaintiff and defendant, the witnesses on the part of the plaintiff swearing that his boat was actually loosed at the time the stone was thrown; and those on the part of the defendant swearing, that it was not loosed, and that the defendant did not throw the stone till after he had several times desired the boats to be unloosed, and the plaintiff had used very abusive language. It appeared that the stern of the vessel was much too high for any one on board the vessel to cut the ropes, and that it would have been very difficult at the time to have lowered any persons

plea in this behalf, as to the assaulting the plaintiff in the said last count mentioned, and striking, bruising, and ill-treating him in that count also mentioned, and by the said defendant above supposed to have been done, he, the defendant, by like leave of the Court here for this purpose first granted, according to the form of the statute in such case made and provided, says, that the plaintiff ought not to have or maintain his aforesaid action thereof, against him, because he says, that, before, and at the time when, &c., in the said second count mentioned, he, the defendant, was the master or commander of a certain other large ship or vessel, called the John, which last-mentioned ship or vessel was then sailing in the river Thames, aforesaid, on a certain voyage from Manilla, in parts beyond the seas, to the port of London. And the defendant further says, that, just before the time when, &c., in the said last count mentioned, to wit, on the day and year in that count mentioned, the plaintiff wrongfully and unlawfully, without the license or consent, and against the will of the defendant, fastened and attached a certain boat, in which the plaintiff then was, by a certain rope, to the stern of the said last-mentioned ship or vessel, whereby the progress of the said last-mentioned ship or vessel was not only greatly retarded and impeded, but, owing to the state of the wind, and of the current and tide of and in the said river Thames, the safety of the said last-mentioned ship was greatly endangered. And the defendant further says, that he, before the said time when, &c., civilly requested the plaintiff to loose, detach, and cast off the said last-mentioned boat from the said last-mentioned ship, which the plaintiff refused to do. And the defendant further says, that, by reason of the height of the said ship, and of her then being under weigh, and sailing and proceeding rapidly in the said river, on her said voyage, the rope whereby the said boat was fastened and attached to the said ship, could not be reached, so as to enable the defendant, or any of the mariners or persons on board the said last-mentioned ship, to loose or cut the same, nor could the plaintiff or the said boat be reached, so as to have enabled the defendant or any of the persons on board of the said last-mentioned ship, to loose, detach, or cast off the said last-mentioned boat from the said last-mentioned ship, nor had the defendant any means to cause the plaintiff to loose, detach, or cast off the said last-mentioned boat from the said last-mentioned ship, but by casting or throwing down some missile at or against him; and the plaintiff having so refused to loose, detach, or cast off the said last-mentioned boat from the said last-mentioned ship, and continuing to refuse to detach or cast off the said boat from the said ship, he, the defendant, in order to cause the plaintiff to loose, detach, and cast off the said last-mentioned boat from the said last-mentioned ship, at the said time when, &c., cast or flung a certain small stone at and against the plaintiff, as he lawfully might, for the cause aforesaid, which struck against the plaintiff and a little bruised him. And the defendant further says, if the plaintiff was hurt or injured thereby, it was occasioned by his so wrongfully and unlawfully fastening and attaching, and continuing fastened and attached the said boat to the said ship, and refusing to loosen, separate, or detach the same from the said ship when requested so to do, and in the necessary endeavour of the defendant to cause the plaintiff to loosen and separate, detach and cast off the said boat from the said ship; which are the said supposed assault and trespasses in the introduction to this plea mentioned, whereof the plaintiff has above thereof complained against him; without this, that he the defendant was or is guilty of the assaults and trespasses aforesaid, at London aforesaid, in the parish of Saint Mary-le-bow, in the ward of Cheap, or elsewhere than in the river Thames aforesaid. And this, he, the defendant, is ready to verify: wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against him.

(Signed)

THOMAS WILDER.

for the purpose of doing so. It also appeared that it was a general practice for boats to be fastened a-stern of vessels coming up the *river, and that, [507 in general, objection was not made to the practice.

TINDAL, C. J. (in summing up), after stating the special pleas, said—The point which you have to consider is this, was the act done by the defendant absolutely necessary in order to cause the boat to be cast off. The law allows a person, when a trespass is committed upon him, to protect himself without unnecessary violence. In all the cases in which such pleas of justification are used, the means are to be such as would, in their natural and ordinary course, produce the effect. Now what necessary connexion is there between the throwing of a stone, and the casting off of a rope? On the contrary, the throwing of the stone might have disabled the man from doing the very thing which it was intended to effect. There is nothing in the mere act of throwing the stone which tends necessarily to produce the effect of casting off the rope. It does not appear to me, if this plea could be sustained, that a much severer mode might not be justified. As, for instance, the firing of a gun, or such like. And I think it would be too much to say, that firing a gun, under such circumstances, could be at all justifiable. There is also another point:—The pleas state, that the object could not be effected by any other mode. It will be for you to say, whether that was so, and you are not limited in your consideration to the precise moment at which the act was done. Why might not the defendant, before he came to the pinch of the danger, have compelled the plaintiff to let go by some other mode? Why could he not have stopt the steamer? Why could he not have put an end to the thing before the danger occurred? A pilot, standing on the shore, did, it seems, foresee the danger. [The pilot was called up, and said, that the steamer could not have been stopt.] Lastly, why could not the defendant have lowered a person to cut the rope? The pilot says, it was difficult, but it was not impossible. It might be *impossible at the moment, [508 but why was it not done before? The points for your consideration are these—*First*, are you satisfied that, in its natural and necessary consequence, the throwing of a stone tends to loosen and disannex a rope? If you are not, then you will find for the plaintiff. And, *secondly*, if you think, that there was any other practicable mode by which the effect could have been produced, in that case also you will find your verdict for the plaintiff.

Verdict for the plaintiff. Damages—10*l.* (a)

Andrews, Serjt., and *Crowder*, for the plaintiff.

Wilde, Serjt., and *C. Phillips*, for the defendant.

[Attorneys—*Hobler*, and *Shave & Co.*]

(a) The foreman of the Jury added—"We should have found a much larger verdict, but we considered the waterman in error—a trespasser."

HOWARD v. CHAPMAN. Feb. 23

A traveller who receives orders for goods from his employer's customer in the country, is authorized to receive payment for them in money, but not in other goods.

ASSUMPSIT for goods sold and delivered. The plaintiff sought to recover from the defendant a sum of 19*l.*, being the price of a quantity of hemp. The plaintiff lived in London, the defendant at Horncastle, and it appeared, from the cross-examination of one of the plaintiff's witnesses, that a person named Sudbury, who was the plaintiff's traveller, took all the orders from the defendant in the course of his various journeys, and that the defendant did not give any orders by letter.

On the part of the defendant, it was then proved, that Sudbury called for payment of the 19*l.*, the subject of the plaintiff's demand, when some difficulty

arose as to the payment of it in money; and the defendant said he had *some horse-hair which he would let the plaintiff have; that Sudbury *509] went and looked at it, and valued it at 20*l.* 5*s.*; that he put down the cost of the carriage to London, and wrote under the account "Settled, J. Sudbury," and put the plaintiff's address on four cards, which were affixed to four parcels, in which the hair was sent up by boat to London.

Taddy, Serjt., for the defendant, relied on this as payment, and contended, that a traveller who was authorized to take orders, was also authorized to receive payment.

TINDAL, C. J. Yes, payment in money, but not in goods. I doubt if Sudbury would have been authorized to buy hemp, and I think that he certainly was not authorized to buy horse-hair. You can call him to show whether he had authority or not.

Taddy, Serjt., after attempting, by several other witnesses, to make out the authority, called Sudbury, who stated, that he took the order for the hemp in question, and, as usual, on the following journey, six months after, called for payment, when the defendant said he could not pay; that he called again, six months after that, and the defendant promised to send some horse-hair to Messrs. Gardner, in London, which would cover the amount. The plaintiff was to get the money from them. That six months after, *viz.* in September, 1830, he went again to the defendant, and asked if he had sent up the hair; he replied, no, and that he could not pay the money, but that he had some hair by him which the witness might have. The defendant showed him Gardners' prices in a letter, and offered the hair at those prices; and the witness agreed to take it. The witness said, that he told the plaintiff of the previous offer to send up hair to Gardners', to which he made no objection; but, on inquiry at Gardners', it was *510] found that none had been sent; he added, that he believed the hair *was received by the plaintiff, and he thought that the plaintiff had told him that he had shown it to some one to ascertain its value. On his cross-examination, he said that he had no authority to enter into any dealings in horse-hair.

TINDAL, C. J. A subsequent ratification is just as good as an authority. I shall leave the question of authority to the Jury.

Spankie, Serjt. Does your Lordship think that there is any evidence of ratification?

TINDAL, C. J. Yes, I think this is evidence. A witness says that the horse-hair was directed to the plaintiff, and sent by boat; and, in the ordinary course of business, it would come to him, and he should have sent it back. Besides, the witness Sudbury says, that he thinks the plaintiff told him that he had shown it to some one.

To rebut this case on the part of the defendant, the plaintiff's clerk was called, and proved that the plaintiff did not deal in horse-hair; that the hair in question arrived on the 14th of October, and was put into the warehouse, but was not unpacked; that one or two persons came to examine it, and it was afterwards sent back.

It appeared that the hair was of three different sorts, of which Gardners' prices were, *per* pound, 10*d.*, 1*s.* 6*d.*, and 3*s.* 3*d.*; and a horse-hair manufacturer, named Buckingham, said, that the prices of fair samples at the time of the same description were 8*d.*, 1*s.* 3*d.*, and 2*s.* 9*d.*, and that he saw the inferior sample, which was called short, and offered the plaintiff 8*d.*, a pound for it if he would keep it for him till the 1st of January; but the plaintiff declined, saying, he wanted a better price.

On the 28th of October, application having been made for payment of the 19*l.* *511] in money, the defendant wrote to *the plaintiff a letter, commencing with these words: "Sir, do you want paying twice over for your short weight hemp," and stating that the account had been settled with the traveller.

To this, an answer was returned on the 30th of October, stating, that the horse-hair had been valued by one of the first brokers; that the utmost value was 8*d.*; and that it was then selling at 6*d.*; and adding, that Sudbury had no au-

thority; and, if he had, the defendant's attempt at overreaching would justify the plaintiff in repudiating the contract.

This letter was addressed to the defendant, and returned to the plaintiff with the post-office mark, "refused."

Taddy, Serjt., submitted, that this letter could not be evidence against the defendant, as it had not reached him.

TINDAL, C. J. You cannot get rid of the effect of a notice by refusing to take it in.

The hair was not sent back till a day or two after the action was commenced, and, when it arrived at Horncastle, the defendant refused to take it in, and it remained at the wharf.

Taddy, Serjt., for the defendant. The plaintiff has ratified the conduct of Sudbury, and meant to take advantage if he could of any higher price that the article might fetch. Why did he not return it sooner? He is concluded, as he did not send it back till after the action was brought.

Spankie, Serjt., in reply. The plaintiff only kept the horse-hair long enough to see whether it was worth accepting, and this does not bind him to an acceptance of it. Sudbury, the traveller, had no knowledge of the value of horse-hair. There was no offer of sale on the plaintiff's part to Buckingham; he was only taking the benefit of his judgment. The plaintiff only kept it [*512 a week or ten days, for, on the 23th of October, the defendant writes acknowledging that he had received an intimation from the plaintiff on the subject, and the horse-hair only arrived on the 14th. The bargain was negligently made, without authority, by a person ignorant of the nature of the article, and that gives the plaintiff a reasonable time to see if the horse-hair could be turned to account. According to the first arrangement, the hair was to be sent to Gardners for sale, and not to the plaintiff. It is also an attempt at imposition on the part of the defendant, as the horse-hair sent was not of the value of Gardners' prices.

TINDAL, C. J. The only question in this case is, whether the contract made by Sudbury, to take horse-hair as payment instead of money, has ever been ratified by Howard, the plaintiff; because, undoubtedly the situation of Sudbury, who was merely a traveller, authorized to take orders, could not, in itself, give him the power to make such a contract. Therefore, we must look at the conduct of the plaintiff afterwards. The first arrangement was very different in its circumstances from the last; because, according to that, the hair was not to be sent for the plaintiff to sell, but to Gardners, who were to pay the plaintiff the proceeds in money. Undoubtedly Sudbury did take upon him to receive the horse-hair in satisfaction of the debt, at the current prices mentioned in Gardners' letter. In point of law, as far as we have any evidence, there was not any *prior* authority. Sudbury himself says he never did anything of the kind before. It is for you to say whether the plaintiff was dealing with the horse-hair as his own, or whether he was only trying to ascertain its value. For he had a right, when an article came, which was fastened in bags, and in which he was not a dealer, before he adopted the act of his agent, to see what the real value of the commodity was, provided he did not keep it an *unreasonable time. It is for you to say, whether the acts of the plaintiff were those of a man [*513 dealing with the article as if it was his own or not. That is the only question in the cause. Verdict for the defendant.

Spankie, Serjt., and *Tomlinson*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attorneys—*Amory & Co.*, and *Norris, A. & A.*]

Vide Doctor and Student, p. 286; Paley on the Law of Principal and Agent, pp. 220 and 231; and *Ward v. Evans*, 2 L. Raym. 930; and 2 Sulk. 442.

COURT OF KING'S BENCH.

ADJOURNED SITTINGS IN LONDON, AFTER TRINITY TERM, 1830.

BEFORE LORD TENTERDEN, C. J.

GOOD v. CHEESMAN.(a) July 10.

A tradesman holding a situation in a public office, being indebted to several persons, they met together, and signed an agreement, in which they stated, that he, being unable to make immediate payment, they agreed to accept payment by his covenanting and agreeing to pay to a trustee of their nomination, one third of his annual income, and executing a power of attorney as a collateral security. The debtor did not sign the agreement, but attended the meeting, and expressed his willingness to comply with its terms. Before anything had been done in execution of the agreement, one of the creditors, who had signed it, brought an action against the defendant for his original debt:—Held, that he could not recover.

ASSUMPSIT on two bills of exchange, given for the price of goods sold and delivered. The plaintiff was a maltster, who had supplied goods to the defendant, who *was a measurer in the Dock-yard, at Portsmouth, and also was *514] in business as a brewer, at Portsea.

The usual formal proof having been given on the part of the plaintiff; on the part of the defendant, a person named Rogers was called, who stated that he was a creditor of the defendant; that he attended a meeting on the 31st October, 1829, at which two other creditors and the plaintiff Good were likewise present, and that they all signed an agreement in these words:—

“Whereas William Cheesman, of Portsea, brewer, is indebted to us, for goods sold and delivered; and, being unable to make an immediate payment thereof, we have agreed to accept payment of the same, by his covenanting and agreeing to pay to a trustee of our nomination, one-third of his annual income, and executing a warrant of attorney, as a collateral security, until payment thereof. As witness our hands this 31st of November, 1829.”

This agreement was not signed by the defendant, but the witness stated that he was present at the meeting, and expressed his willingness to act upon the agreement. The witness added, that the defendant's salary, as Measurer, was 180*l.* a year; and it was arranged at the meeting, that if a creditor named Gloge, who did not attend it, should come into the arrangement for giving time, then an additional sum of 20*l.* a year was to be taken from the salary, and added to the third, which was to be paid to the trustee. He further stated that he was willing that the agreement should be carried into execution; but, on his cross-examination, he admitted that he had not received any money in pursuance of it, because there was a running account between him and the defendant.

The defendant's attorney was also called as a witness on his behalf, and stated, that he attended the meeting, considering himself particularly as acting for the defendant, but that he acted for the other parties also; that the *plaintiff *515] called at his office, about three weeks after the meeting, and requested a sight of the agreement, and being told by the witness that he could not lay his hand on it at the moment, said—“I shall not fulfil the agreement, I shall be satisfied with nothing less than 10*s.* in the pound;” adding, that he would ruin the defendant if he did not get that, though it should cost him 200*l.* On his cross-examination he said, that Gloge put an execution into the defendant's house, about the beginning of the year 1830, on a judgment several years old; and that the execution was two or three months after the commencement of the present action.

On the part of the plaintiff, in reply, a letter was put in, written by the defendant to him, requesting him, if he saw Woolrich (who was one of the creditors

(a) Omitted, *ante*.

that attended the meeting), to tell him to come to him, and also to come himself, as some objection had been made to the agreement on the part of Gloge.

Scotland, for the defendant, contended, that, on the facts proved, although the agreement did not convey the property, yet, as the other creditors considered themselves bound by it, that was a sufficient consideration. It would be a fraud on the other creditors, who were induced to join in the agreement by the plaintiff's signing it, if he could now obtain an advantage over them by succeeding in this action. And, with respect to the letter put in for the plaintiff, in reply, it was clearly applicable only to the arrangement respecting Gloge's claim, which constituted a separate agreement.

Follett, for the plaintiff. Such an agreement as that relied on is no answer, unless something has been done upon it. It is neither accord nor satisfaction of the debt, and the cases are express, that, if the agreement is not under seal, it is no answer unless something is done upon it. **Fitch v. Sutton*, 5 East, 230, *Steinman v. Magnus*, 11 East, 390. In one of these cases, the acts [*516 done were relied on as satisfaction. But here there is nothing to bind the defendant. He might have refused to comply. It is only an agreement by the creditors, that they will take their debts in this way, if certain things are done, which the defendant is not bound to do. The letter of the defendant shows that there was an objection by Gloge, and the matter was not settled. It may be assumed, that the defendant considered the agreement at an end, on account of Gloge's objection.

Lord TENTERDEN, C. J. (in summing up), said—The only question of fact is, whether this agreement was to stand, if Gloge did not come into the arrangement. If you think the agreement was to stand for one-third of the salary, if Gloge did not come in, and that, if he did, 20*l.* was to be added; then I should recommend you to find your verdict for the defendant; and the plaintiff shall have leave to move to have a verdict entered for him, if, on consideration, the Court shall think that the agreement is not an answer to the action. The only doubt I feel with reference to the decided cases arises from the circumstance that the defendant in this case was not to do the previous acts. If it had been for the defendant to name the trustee, then I should have thought that the agreement was no answer, unless it had been shown that that had been done. But the defendant in this case could not do it, as the trustee was to be a person nominated by the creditors.

Verdict for the defendant, with leave, &c.

Follett, for the plaintiff.

Scotland, for the defendant.

[Attorneys—*T. Minchin*, and *Conry*.]

*In the ensuing Michaelmas Term, *Follett* obtained a rule nisi, pursuant to the leave given at the trial; which rule came on to be argued in [*517 Easter Term, 1831.

Scotland showed cause against it, and contended, that the agreement was binding on the plaintiff, as, through his concurrence in it, the interests of third parties, viz. the three other creditors who signed the agreement, were affected. If this sort of transaction fell within the principle of accord and satisfaction (which seemed very doubtful, it being rather in the nature of a release or discharge of the original contract, by substituting a new agreement, on which each of the parties to it had a remedy by action, and might recover damages for a breach of it), no doubt there must be a new executed consideration, amounting to satisfaction, moving from the defendant. But, in this case, it was sufficient to maintain the agreement, that the other creditors had been induced by the plaintiff's joining in the agreement to relinquish each of them a certain portion of his rights. He cited *Boothbey v. Sowden*, 3 Camp, 175, *Cockshott v. Bennett*, 2 T. R. 763, *Steinman v. Magnus*, 11 East, 390, *Cranley v. Hilary*, 2 M. & S.

120, *Tatlock v. Smith*, 6 Bing. 339, S. C. 3 M. & P. 676, (a) *Butler v. Rhodes*, 1 Esp. 236, and *Wood v. Roberts*, 2 Stark. 417.

Follett was heard on the other side.

The Court were of opinion, that the *Nisi Prius* ruling was correct; and the rule for setting aside the verdict, which had been found for the defendant, was therefore
Discharged.

(a) Cited *ante*, p. 300, in *Garrard v. Woolner*, which see.

*518] *SECOND SITTING AT WESTMINSTER, IN HILARY TERM,
1831.

BEFORE MR. JUSTICE J. PARKE.

CALLO v. BROUNCKER. Jan. 13.

To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect.

THE *first* count of the declaration stated, that the defendant was indebted to the plaintiff in 200*l.*, for wages or salary as a hired servant. The *second* count stated that, in consideration that the plaintiff, at the special instance and request of the defendant, would enter into and continue in her service as a hired servant and courier, for the space of one whole year, to travel with her during that period from Great Britain to divers foreign parts and places, she undertook to maintain and continue him in her service as her hired servant and courier, for and during the said space of one whole year, provided he behaved and conducted himself properly as such courier and servant, and to pay him wages at the rate of 10*l.* a month. It then averred, that the plaintiff entered into the service of the defendant, and travelled with her to Florence, and continued there for four months, during all which time he, to the best of his ability and power, performed the duties and offices of a courier and true and faithful servant to her, and at all times during the continuance of the said space of one whole year was ready and willing to have stayed and continued in her service, and to have performed his duties; yet the defendant not regarding her promise, &c., before the expiration of the said period, to wit, &c., wrongfully and improperly, and without any reasonable or justifiable cause, discharged him from her service at Florence, and thenceforth wholly refused to maintain or continue him in her
*519] service, or to pay him, for the residue of the year, any *wages whatever, by means whereof he not only lost wages to the amount of 80*l.*, but was forced to maintain himself at his own costs, and to lay out large sums as travelling expenses, in returning from Florence to Great Britain. There were other common counts; and the plea was the general issue.

On the part of the plaintiff, the hiring for a year, from the 1st of August, 1827, at 10*l.* a month, was proved; and it appeared that he went as courier with the defendant, who was a widow lady, and her family, to the Continent, and in the month of December, 1827, when they were at Florence, he was dismissed from the service.

On the part of the defendant it was proved, that, on getting into the carriage at the stage before Padua, the defendant desired the plaintiff not to stop at a particular hotel, where they had been before, but to drive to another; but that he, notwithstanding, did stop at that hotel; and, when remonstrated with, said he had not been told; and, at the second hotel appeared to be very sulky; and

also that he had neglected to come on two or three occasions when he had been rung for, and was insolent in his manner at Florence.

Sir *J. Scarlett*, for the defendant, contended that this was such improper conduct as justified the defendant in dismissing the plaintiff.

Campbell, for the plaintiff, argued that there must be gross misconduct to produce a dissolution of the contract, and that no such conduct had been proved against the plaintiff.

Mr. Justice J. PARKE told the Jury, that there was a contract for a year, with an implied agreement, that, if there was any *moral misconduct*, either pecuniary or otherwise, *wilful disobedience*, or *habitual neglect*, the defendant *should be at liberty to part with the plaintiff. His Lordship added, that, in his opinion, no such conduct had been proved, and that the [*520 plaintiff was entitled to his wages for the year. (a)

Verdict for the plaintiff. Damages—67*l.* 10*s.*, afterwards reduced by consent on motion.

Campbell, and *Watson*, for the plaintiff.

Sir *J. Scarlett*, and *Long*, for the defendant.

[Attorneys—*G. Smith*, and *Vizard & Co.*]

(a) 15*l.* had been received on account, and 62*l.* 10*s.* was paid into Court.

SITTINGS AT WESTMINSTER, AFTER HILARY TERM, 1831.

BEFORE LORD TENTERDEN, C. J.

SANDYS, and Others, Gents., v. HORNBY, Gent. Feb. 1.

An agent to a country attorney need not deliver a bill under the stat. 3 Jac. 1, c. 7. s. 1, if the charges be for agency in causes in which the defendant was the attorney and in which the plaintiff acted as his agent.

ASSUMPSIT for an agency bill. It appeared that the defendant was an attorney, and that the plaintiffs were his town agents; and that the business done was the conducting of causes in which the defendant was the attorney, and in which the plaintiffs acted as his agents. There was evidence that the business had been done, but there was no proof of the delivery of any bill.

R. V. Richards, for the defendant, relied on the stat. 3 Jac. 1, c. 7, [*521 sect. 1, and the case of *Heming and Another v. Wilton*, ante, p. 318.

LORD TENTERDEN, C. J. I am of opinion that the stat. 3 Jac. 1, c. 7, s. 1, does not apply to agency bills, as the words "masters or clients," in that statute, (a) are quite inapplicable to agents. Verdict for the plaintiffs.

This case had stood over from the third Sittings in Hilary Term, "with judgment of the Term, if the Lord Chief Justice should think proper."

R. V. Richards asked that there might not be judgment of the Term, to give him an opportunity of moving for a new trial; but

LORD TENTERDEN, C. J., would not grant the application, and there was, therefore, Judgment of Hilary Term.

Smirke, for the plaintiffs.

R. V. Richards, for the defendant.

[Attorneys—*Sandys & Sons*, and *Hall.*]

(a) See sect. 1 of this stat, set forth ante, p. 318. n. (a).

*522] *SITTING IN LONDON AFTER HILARY TERM, 1831.

HARRIS v. RICHARDSON. Feb. 2.

In an action on a bill of exchange, where the declaration alleges that notice of dishonour was given to the defendant, it will satisfy the allegation to show that notice was given before action brought, although, from the party's not being to be found, it was not given at the proper time.

But *semble*, that such an allegation is not satisfied by proof of the use of due diligence in endeavouring to find the party, where no notice has been given at all.

ASSUMPSIT on a bill of exchange. The declaration alleged that notice of dishonour was given to the defendant; and, to satisfy this allegation, a witness was called, who stated that he went for the purpose of giving such notice to No. 5, in the Oval at Kennington, where he saw a female servant, and told her that he wanted Mr. Richardson, and was come to give him notice of the dishonour of a bill. The servant replied, that Mr. Richardson had left, that she believed he had failed in business; but if he, the witness, wanted to know anything more, he must inquire of a Mr. Pledge, who lived in the neighbourhood.

Rigby, for the defendant, having objected—

Maclean, for the plaintiff, cited *Crosse v. Smith*, (a) and contended, that anything which amounted to an excuse, by showing that the party had used due diligence, was sufficient to sustain the allegation.

Lord TENTERDEN, C. J. I have always had considerable doubt about that. When notice in such a case is proved to have been given before action brought, *523] I have thought it sufficient, although it was not given at the proper time; but here you do not prove that any notice has been given at all. In *Crosse v. Smith*, the parties went to the counting-house. The only question is, whether this evidence will sustain the allegation; I am of opinion that it will not; and therefore I must nonsuit the plaintiff. But I will give you leave to move to enter a verdict for the plaintiff, for the amount of the principal and interest.

Rigby, for the defendant, then called a witness, who proved, that, on the 17th of May, the day when the bill was drawn, the defendant had a counting-house for the sale of wine, in Adam Street, in the Adelphi, and lived there also; that he had not, at that time, any residence in the Oval, nor had since the month of March, at which time he let his residence there to a person named Glennie. The witness added, that he sued out a commission of bankrupt against the defendant, which was gazetted just before the bill became due. (b) On his cross-examination he said, that he only knew that Glennie lived in the house in the Oval, from having applied to him for a quarter's rent; but that he did not know whether he occupied the whole house or not.

Lord TENTERDEN, C. J. On this evidence it is quite clear, that the defendant was gone away before the time when the bill became due. You will have leave to move to enter a verdict for the plaintiff.

Nonsuit, with leave to move. (c)

*524] **Maclean*, for the plaintiff.
Rigby, for the defendant.

(a) 1 M. & S. 545. That case decides that notice to the drawers of the non-payment of a bill of exchange, by sending to their counting-house, during the hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place.

(b) The Gazette was not produced, but it was stated that the defendant was there described as of Adam Street, Adelphi, Wine Merchant.

(c) No motion was made; and indeed, after the evidence given on the part of the defendant, it would have been in vain to expect success. With respect to the point as to any excuse satisfying the allegation that notice was given—in a case mentioned in a note in the last edition of Mr. Justice Bayley's Treatise on Bills, two of the Judges intimated an opinion that it could

not; but the decision in the case turning upon another point, the rest of the Court did not give any opinion upon it.

MOSES and Another v. CRAFTER. Feb. 4.

On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator, which are either desperate or doubtful; and the executor has a right to exercise his judgment fairly and *bonâ fide*, whether a debt is doubtful or bad.

REPLEVIN. The defendant made cognisance for rent arrear, as the bailiff of the executor of a person named Curtis.

There were several cognisances, but it is not necessary to state them, as the defendant stated himself to be the bailiff of the executor, in all of them. There was a plea of *non tenuit*, and several other pleas.

It appeared that Mr. Curtis was a lessee, under the Duke of Portland, and that the plaintiff was his under-lessee. The probate duty on the proving of Mr. Curtis's will, had been paid upon 2000*l.*; but it appeared that the property of the testator would have exceeded 2000*l.*, if a debt due to him from Messrs. Marsh & Co. had been included, and also a debt which had been received by instalments. Messrs. Marsh & Co. had become bankrupt.

It was objected, that these debts ought to have been included in the amount for which the probate duty was paid.

Sir J. Scarlett, and R. V. Richards, *contra*, argued, that in calculating the amount of probate duty, bad and doubtful debts ought not to be included.

Denman, A. G., F. Pollock, and Godson, for the plaintiff, contended, that the probate duty was payable on the *gross amount of the property, without making any deduction for doubtful debts, as there was a power given [525 to the commissioners of stamps to return the duty, if too much had been paid.

Lord TENTERDEN, C. J. Are you not to deduct the desperate debts? The debt due from Marsh & Co. was clearly desperate, and the other debt might not have been received.

F. Pollock. I submit that no deduction can be made in the first instance. With the policy of the law we have nothing to do. The act of parliament requires that the probate duty should be paid on the gross amount of the property to which the testator appears to be entitled at his death, without any deductions for his liabilities; and consequently, he is not to exclude debts which may be received.

Lord TENTERDEN, C. J. I think that desperate and doubtful debts need not be included; and that the executor has a right to exercise his judgment fairly and *bonâ fide*, whether a debt is doubtful or bad.

Verdict for the defendant.

Denman, A. G., F. Pollock, and Godson, for the plaintiff.

Sir J. Scarlett, and R. V. Richards, for the defendant.

[Attorneys—Hill & R., and Sandom.]

For the report of this case, we are indebted to the kindness of one of the learned counsel engaged in it.

*STORY and Another v. PERY. Feb. 12.

[526]

If a tradesman trusts an infant, he does it at his peril, and he cannot recover if it turns out that the party has been properly supplied by his friends.

ASSUMPSIT for goods sold and delivered. The plaintiffs were tailors, and the defendant the son of Lord Glentworth, and grandson of the Earl of Limerick.

The clothes were furnished in September 1830, at which time the defendant was between 17 and 18 years of age.

The principal articles in the bill, were—

" A rifle green coat, lined with silk, charged at	£6	0	0
" A pair of royal purple casimere trousers - - -	2	14	0
" A pair of shepherds' plaid trousers - - -	1	16	0

It was proved that the charges were reasonable.

On the part of the defendant, a tailor, residing in Jermyn Street, was called as a witness. He stated, that he was in the habit of supplying Lord Glentworth's family with clothes, and, during the year 1830, had supplied the defendant, on Lord G.'s credit, with four or five suits; and that some of the clothes were furnished within six weeks previous to the month of September. He added, that he was not allowed to supply any clothes to the defendant, without an order either from Lord or Lady G. It appeared that Lord Glentworth was a prisoner for debt in the King's Bench Prison.

Moody, for the defendant, submitted that a tradesman was not justified in supplying even necessities to an infant, without first inquiring whether he was or was not supplied with proper necessities by his friends, and whether the things furnished were actually required by him; and that, in this case, the plaintiffs were not entitled to recover, because it appeared that the defendant had been sufficiently supplied with clothes on his father's credit. He also contended that *527] the action had been brought too soon, *as it was evident, from the prices charged, that the goods must have been sold on a twelvemonths' credit, and not for immediate payment.(a)

Henry, for the plaintiffs, contended, with respect to the alleged necessity of inquiry; that a tradesman could not be expected to ask every customer whether he was of age or not; and, with respect to the things furnished, he contended, that they were necessities; and with respect to the action having been brought so soon after the supply, he submitted that a tradesman was justified in such a course, when he found that he had got a slippery customer.

Lord TENTERDEN, C. J. The question, if there be any in this case, is, whether these things were necessities suited to the defendant's rank and station in society. It is the duty of all to enforce that wholesome provision, which protects infants from their own improvidence; and that cannot be better done than by preventing others from encouraging them in that improvidence. If a tradesman trusts an infant, he does it at his peril, and he cannot recover if it turn out that the party has been properly supplied by his friends.

Verdict for the defendant.(b)

Henry, for the plaintiffs.

Moody, for the defendant.

[Attorneys—*Dagley*, and *Bebb & G.*]

(a) A witness, who was said to have been present when the order was given, was stated to be abroad.

(b) *Vide* the case of *Cook v. Deaton*, 3 C. & P. 114, in which Lord Wynford, then Lord Chief Justice Best, ruled that it was the duty of a tradesman, before he supplied an infant with clothes, to make inquiries of his friends, as to the necessity of the supply. *Vide* also the cases there referred to.

*528] *KERR and Others v. SHEDDEN and Others. Feb. 24.

If the surveyor to a society which publishes an account of the different *classes* of ships, for the information of merchants, underwriters, &c., is requested by a ship owner to survey his ship, and does so in consequence, and makes a report to the society, who class the vessel according to his report, such ship owner cannot maintain an action against the members of the society for a libel in misdescribing the ship; nor against the surveyor, unless he made a false report: and *quære*, whether such an action is maintainable at all without evidence of express malice?

THE first count of the declaration, in substance, stated, that the plaintiffs were the owners of a schooner, called the *Delos*, of which one Joseph Cristal was

master, and which, at the time, &c., was bound on a voyage from the port of London to Smyrna, as a general ship, and at that time was, and still continued to be, a vessel of the first class, and built with materials of the first quality; nevertheless, the defendants, well knowing the premises, but contriving and wrongfully and maliciously intending to injure the said plaintiffs, so being owners of the said ship or vessel, and to have it suspected or believed that the said ship or vessel was built with bad or inferior materials, and was a vessel of an inferior class, and thereby to prevent the plaintiffs from procuring freight, &c., and otherwise to injure them, as owners, &c., on the 1st of January, 1829, in a *Supplement* to a certain book, purporting to be *The Register of Shipping for the Year 1829*, and purporting to contain a list, description, and classification of British and foreign merchant ships, by columns, and in manner therein mentioned, (in which said book the ships therein marked A, were explained to be ships of the first class; those therein marked E, to be ships of the second class; those therein marked I, to be ships of the third class; those therein marked O, to be ships of the fourth class; and those therein marked U, to be ships of the fifth class; and in which said book certain abbreviations therein used, and, amongst others, the letters SS. in a certain column there, were explained to mean "small scantling,") falsely and maliciously printed and published of and concerning the said ship, &c., and of and concerning the materials of which she was built, her tonnage, the place at which she was built, to wit, at Shoreham, her age, her draught when loaded, her cables, her surveying port, to wit, at London, and the port to which she was bound as aforesaid, the false, &c., matter *and description following, in and by the words, figures, letters, lines, and observations following, and amongst others, the said abbreviation, SS., (the same ship not being marked with any of the letters, A, E, I, O, or U), that is to say, [here followed a copy of the description in the book in columns] thereby meaning and intending it to be suspected and believed, that the said ship or vessel of the said plaintiffs was built with small scantling, and inferior timbers, and was not a vessel worthy of being classed in any of the five classes above mentioned. The declaration then went on in the *second* count to state that part of the libel which consisted in denoting the ship by the letters SS., and the words "inferior timbers and fastenings;" and in the *third* count, by the words inferior timbers and fastenings, omitting the SS. It then alleged, as special damage, that Messrs. Ralli, Brothers, Messrs. N. P. Argenti & Co., Messrs. Frangheardi, Brothers, and Mr. Castelli, refused to load goods on board, whereby the plaintiffs lost the expected freight and profits. [529]

The pleas were—Not guilty, and four special pleas; the *first*, as to the omission of the letter A, and the other matters in the first count, except as to the letters, E, I, O, U, that the ship was of inferior class and principle, and not of the first class, nor entitled to be denoted by the letter A, and was also deficient in the particular specified. The *second*, as to the omission of all the letters, A, E, I, O, and U, that the ship was inferior and unfit to be denoted by any of them. The *third*, that the ship was inferior to those in class A, and superior to those in classes E, I, O, and U; and the *fourth*, to the second count, that the ship was of inferior scantling, and also inferior in the other particulars specified. Replication—*De injuriâ*.

It was admitted, that the plaintiffs were the owners of a vessel called the *Delos*, and that the publication complained of was printed by the order and authority of the committee, for 1829, of a society of which the defendants were the chairman and two of the committee. The publication *appeared on the 18th [530] May, 1829. On the 22d of that month, a letter was written by two of the plaintiffs to the committee, commencing—"We regret the necessity of addressing you, as the owners of the *Delos*," and complaining of the "unwarrantable description of the vessel" in the supplement to the *Register of Shipping*, and threatening legal proceedings on the subject. In consequence of this letter, a meeting of the committee was held, on the 26th May, both the surveyors of the society for the port of London having specially surveyed the vessel; at

this meeting, Cristal, one of the plaintiffs, attended, and, after some discussion, the meeting was adjourned till the following Thursday, when Cristal produced a certificate, showing that certain alterations had been made in the vessel to meet the objections of the surveyor; but the committee were of opinion that more was requisite, and told him, that if he would put five iron floor riders, and two beams in the weight of each mast, they would put the vessel in the first class. He said he could not, as she was going on her voyage, and had part of her cargo on board; but if they would place her under the letter A, for that voyage, these things should be done on her return. The committee said they could not do that, and must remove her from the book altogether. Upon which Cristal said, that he would appeal to another tribunal. The entry in the book, which was complained of as the libel, consisted of two lines, and described the vessel as a schooner, of which J. Cristal was the master, of one hundred and thirty-three tons burthen, built at Shoreham, drawing fourteen feet of water, bound from London to Smyrna, of small scantling, and inferior timbers and fastenings, &c. &c. In the column in which (when ships are described by a vowel) the letter is placed, there was not any letter applying to this vessel, but only the figure 1. It appeared that the book was corrected once a week by means of a moveable hand type, and the next time it was reissued after the above entry was objected to, it *531] appeared with the two lines struck out altogether. It *was proved that there were several ships entered in the book without being denoted by any of the vowels. (a) Many witnesses were called on the part of the plaintiffs, who stated, that the vessel was a good one, and improperly described in the entry; and the special damage was also made out.

It further appeared that three vessels, the Matchless, the Paul Pry, and the Exquisite, built by the same person, and in the same manner as the Delos, had been classed under letter A.

Campbell, for the defendants. If these actions can be maintained, it will go to prevent the society from continuing its useful operations. It is impossible that the defendants can have been actuated by malice. If they had acted mistakenly, which I contend they have not, they would still be entitled to a verdict. The publication merely states, that the ship is of small scantlings, and not entitled to be ranked in class A. It imputes nothing dishonourable to the plaintiffs; *532] it is not a libel. This case is *like an action for slander of title, and an action for giving a false character of a servant, and malice is the foundation of it. If the defendants have acted fairly and honestly, even though they may have acted in mistake; they are entitled to a verdict. The entry is made on the report of Courtney, there is no malice in that. They must have somebody to survey, and upon whose statements they must act. The defendants have only done in the original publication of the statement, what has been usual since the formation of the society, in 1773. Then when did the offence begin. The action is not brought for the striking out afterwards, but for the original publication on the 18th of May. On the 22d, a letter is sent threatening an action. The committee could do no more than send down both the surveyors. When the things to be done were suggested by the committee, Cristal did not say that they were not necessary; but said, if they would put the vessel under letter A, he would have them done on her return from her voyage. On the 28th, Cristal refuses, and says that he will appeal to another tribunal. As matter of criticism,

(a) It was stated that the society in question consisted of about two hundred persons, who subscribed ten guineas a year, and was managed by a committee of eleven, and had surveyors in all the principal ports of Great Britain. The average number of vessels surveyed every year, and entered, was estimated at ten thousand. It was also stated, that the list was made up from the reports of the surveyors, and that ship owners were generally desirous of having their ships entered, and frequently complained if they went away without having been surveyed. The letter U was described as denoting a vessel fit only to be broken up. O, a bad vessel, not fit to go to sea with any cargo. I, a ship fit to carry goods not likely to be damaged by salt water. E, a ship past a certain age, but still fit to carry dry goods; and A, the finest ships both as to materials and workmanship. It did not appear that there was any particular time during which ships were to be considered as remaining in class A, previous to their removal to class E, but that it varied from four to twelve years, according to the place where they were built, and the materials of which they were composed.

a man may give his opinion of a ship, if he does not act maliciously. The case of *Pitt v. Donovan*, and several other cases, establish the principle upon which this doctrine is founded. The distinction is between that which imputes moral turpitude to a man, and that for which, if it injures him, he cannot have a remedy unless he shows malice. I shall show that the ship was surveyed at Cristal's request by Courtney. The *Matchless*, the *Paul Pry*, and the *Exquisite*, all appeared in the Register, before Courtney became surveyor to the society. It is said to have been Courtney's doing, but he had no bad motive, he had no interest in misdescribing the plaintiff's vessel. The ship, it appears, had small scantlings. It would have been productive of most injurious consequences, if she had been classed under letter A, without being entitled to the character which that letter is intended to denote. It has been proved, that there are ships not denoted by any letter, *and they could not be in any of the classes, and, therefore, [*533 could not be included under any of the letters. It is a case of the greatest importance. If the book in question is to be dropped, ship owners and underwriters cannot go on.

Captain Courtney, one of the surveyors appointed in January, 1829, was called, and was proceeding to give evidence as to the state of the plaintiffs' vessel, when—

One of the Jury inquired if it were essential to prove malice, in order to maintain the action.

LORD TENTERDEN, C. J. I shall give you my opinion upon that presently. There is one fact opened which has not been proved.

The witness Courtney then said, that he surveyed the ship in London, and made his report, and that the publication corresponded with his report. He was going on with his account of the state of the vessel, when—

LORD TENTERDEN, C. J. (being appealed to by the plaintiffs' counsel, on the subject of his observation as to the fact not proved), said—I am of this opinion. If they prove, which I expect they will by the evidence of Ditchburn, that Cristal requested the surveyor of these defendants to examine the ship, he can bring no action against them for what they do in consequence of his report.

Ditchburn, the other surveyor, was then called, and proved that he saw Cristal on 'Change, who asked him to survey the *Delos*, and put her in full; that he replied, that it was not in his district, but in that of Captain Courtney, who knew more about her; but that he would speak to Captain C., to go on board and survey her; that Cristal said "Do," and the witness, in consequence, told Captain Courtney immediately.

*LORD TENTERDEN, C. J. Upon this evidence I am of opinion that [*534 I ought to nonsuit.

F. Pollock, for the plaintiffs. I understand the distinction to be, that as the plaintiff requested the surveyor to survey, the remedy is against him and not against the defendants.

LORD TENTERDEN, C. J. If he made a false report.

F. Pollock. If they had done it of themselves—

LORD TENTERDEN, C. J. I should have doubted. Upon this evidence I have no doubt.

Nonsuit.

Sir *J. Scarlett*, *F. Pollock*, and *Tomlinson*, for the plaintiffs.

Campbell, and *Maule*, for the defendants.

[Attorneys—*Allen*, and *Lavie*.]

*535] *OXFORD SPRING CIRCUIT. 1831.

BEFORE MR. JUSTICE BOSANQUET, AND MR. JUSTICE PATTESON.

OXFORD ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

REX v. EDMUND MEAD.

The halves of country bank notes, sent in a letter, are goods and chattels; and a person who steals or embezzles them is indictable for such larceny or embezzlement.

EMBEZZLEMENT. The indictment, in some of the counts, charged the prisoner with embezzling pieces of paper of the value of one penny, the property of his master; and, in other counts, the property was stated to be "pieces of paper partly written and partly printed," bearing stamps, the values of which were specified. All the counts charged the property to be "of the goods and chattels of Samuel Cooper."

It appeared that the prisoner was the servant of Mr. Cooper, of Henley; and that it was his duty to fetch the letters from the post office. It was proved that the stamp distributor at Banbury had remitted to Mr. Cooper, by post, the first halves of country bank notes, to the amount of 190*l*.; and evidence was given to show, that this letter was received by the prisoner, at the post office at Henley, and that he afterwards embezzled the halves of the notes.

*536] *Carrington, for the prisoner, submitted, that these halves of country bank notes were not goods and chattels. If the notes had been entire, they would have been *choses in action*, not goods and chattels; but, in their present state, they were of no value.

Mr. Justice BOSANQUET. They might have been made of value to Mr. Cooper, by his putting the two halves together. In the case of *Rex v. Clark*, country bank notes, which had been paid in London, and were sent back to the country to be re-issued, were held to be the subject of larceny, because they were of value to the bankers, as being re-issuable. (a) I will consider of the objection, and if I should think it is a valid one, I will give the prisoner the benefit of it.

Verdict—Guilty.

Chilton, and *Walesby*, for the prosecution.

Carrington, for the defence.

[Attorneys—*Cooper*, and *Robeson*.]

The prisoner was afterwards sentenced to be transported for seven years.

(a) 2 Leach, 1036. In that case, Mr. Justice Grose, in delivering the judgment of the twelve Judges, said—"Their value and character as promissory notes were certainly extinct at the time they were stolen; but they bore about them a capability of being legally restored to their former character and pristine value. They were indeed only of value to their owners; but it is enough that they were of value to them: their value as to the rest of the world is immaterial."

In the case of *Rex v. Vyse*, R. & M. C. C. R. 218, it was held, that re-issuable notes, if they could not be properly called valuable securities while in the hands of the maker, were goods and chattels, and that a party might be indicted for receiving them, knowing them to have been stolen. In that case, some of the counts described the notes as pieces of paper, stamped with certain stamps (describing them), of the goods and chattels, &c., and in the other counts they were described as promissory notes.

*BEFORE MR. JUSTICE PATTESON.

[*537]

REX v. PERKINS and Others. *March 3.*

Persons who are present at a prize-fight, and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants; and it is not at all material which of the combatants struck the first blow.

INDICTMENT for a riot and an assault on Robert Coates.

It appeared that a prize-fight was fought between the defendant Perkins and Robert Coates, and that another of the defendants, named Weekly, acted as the second of the defendant Perkins, and that the two other defendants were present, the one collecting money for the combatants, and the other walking round the ring and keeping the people back. It appeared that many hundred persons were assembled, and that the defendant Perkins struck the first blow.

Mr. Justice PATTESON (in summing up). It appears, in this case, that a great number of persons were assembled together on this occasion, and that there was a breach of the peace. It is clear, that the parties went there intending that a breach of the peace should be committed. There is no doubt that prize-fights are altogether illegal; indeed, just as much so, as that persons should go out to fight with deadly weapons; and it is not at all material which party struck the first blow. It is proved that all the defendants were assisting in this breach of the peace; and there is no doubt that persons who are present on such an occasion, and taking any part in the matter, are all equally guilty as principals.

The foreman of the Jury said, that they doubted whether they could find all the defendants guilty of an assault.

Mr. Justice PATTESON. If all these persons went out *to see these men strike each other, and were present when they did so, they are all, [*538 in point of law, guilty of an assault. There is no distinction between those who concur in the act and those who fight.

Verdict—Guilty of the riot, but not guilty of the assault.

Cooper, for the prosecution.

Ludlow, Serjt., for the defence.

[Attorneys—*B. Aplin*, and ———.]

See the case of *Rex v. Billingham*, 2 C. & P. 234.

REX v. COX and Others. *March 3.*

If persons be charged with a riot and cutting down fences, and the indictment do not conclude *in terrorem populi*, they cannot, on that indictment, be convicted of a riot, but may be convicted of an unlawful assembly.

Semble, that if a person be tried at the Assizes, on an indictment removed by *certiorari*, the Judge would, under very special circumstances, receive affidavits in mitigation, before he proceeded to pass sentence, under the stat. 1 W. 4, c. 70, s. 9, but not in ordinary cases.

INDICTMENT for a riot, and cutting down hedges, &c., the property of the Earl of Abingdon, Sir Alexander Croke, and others. The indictment did not conclude *in terrorem populi*. (a) The indictment had been found at the Quarter Sessions, and removed into the Court of King's Bench by *certiorari*.

It appeared that a place, called Otmoor, had been enclosed under an act of parliament; and that the ten defendants, together with a great number of other

(a) The indictment was in the form given in Arch. C. L. for a riot and assault, omitting the part relating to the assault, and stating the cutting down of fences, &c.

persons, had assembled with axes, &c., to destroy the fences, and had cut down various hedges, &c., belonging to the prosecutors.

*539] *Ludlow*, Serjt., *Talfourd*, *Chilton*, and *White*, for the *respective defendants, objected, that the defendants could not be convicted of a riot, as the indictment did not conclude *in terrorem populi*. And they cited the case of *Rex v. Hughes*, ante, p. 373.

Mr. Justice PATTESON. As there is this omission in the indictment the defendants cannot be convicted of a riot, but they may on this indictment be convicted of an unlawful assembly.

Verdict—Guilty of an unlawful assembly.(a)

The defendants came up to receive sentence under the statute 1 W. 4, c. 70, s. 9.(b)

*540] **Chilton*, for the defendants, proposed to put in an affidavit.

Mr. Justice PATTESON. After the trial of a traverse on the Crown side of the Assizes, affidavits are never put in; and this act of parliament is, in my judgment, not only intended to relieve the Court of King's Bench, but to put these cases in the same situation as traverses. I do not mean to say that affidavits might not be received after the trial of a traverse, under very special circumstances; for although I know of no case, in which such affidavits were used, yet there is, I believe, no instance in which they have been tendered and refused. In this case, I think it would be better to have no affidavits on either side, as I do not see how they could be of any use.

Sentence was passed on the defendants.

Jervis, *Russell*, Serjt., and *Curwood*, for the prosecution.

Ludlow, Serjt., and *Chilton*, for eight of the defendants.

Talfourd, and *White*, for the defendant Ward.

[Attorneys—*Walsh*, and *Lee*.]

(a) On this conviction, the defendants could not be sentenced to hard labour, which they might have been if convicted of a riot.

(b) By which it is enacted—"that upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the Sittings or Assizes by the Judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default, or confession, upon the same record, as upon those who shall be tried and convicted, *whether such persons be present or not in Court*, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his Majesty's Attorney-General, wherein the Attorney-General shall pray that the judgment may be postponed; and the judgment so pronounced shall be endorsed upon the record of *Nisi Prius*, and afterwards entered upon the record in Court, and shall be of the same force and effect as a judgment of the Court, unless the Court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended; and it shall be lawful for the Judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison."

In the case of *Rex v. Woodward and Hunter*, the defendants were indicted at the Worcester Quarter Sessions, for an assault. The indictment was removed by *certiorari*, and was tried on the civil side of the Worcester Assizes (1831), before Mr. Justice Patteson. The defendants were found guilty, and the learned Judge sentenced them, *without their being present*, to pay a fine of 10*l.* each, and to be imprisoned till these fines were paid. And his Lordship directed that a warrant should issue to take the defendants in execution of this sentence; but the fines were paid before any warrant was actually issued.

*WORCESTER ASSIZES.

[*541]

BEFORE MR. JUSTICE PATTESON.

SMITH, Assignee of PARKER, a Bankrupt, v. WOODWARD.

If a bankrupt, before his bankruptcy, let a person have goods, telling him to keep them till he (the bankrupt) wants them back, and no demand be made of them till after the bankruptcy—Held, that if, in an action of detinue by the assignees, notice is given of disputing the bankruptcy, the proceedings are evidence of the trading, &c., under sect. 92 of the bankrupt act.

DETINUE for goods. Pleas—*Non detinet*, and several special pleas denying the bankruptcy. Notice had been given of disputing the trading, petitioning creditor's debt, and act of bankruptcy.

It appeared that the bankrupt had let the defendant have these goods, which, he told him, he might keep till he (the bankrupt) wanted them back. The return of the goods had never been demanded by the bankrupt, but they had been demanded by the assignees since the bankruptcy.

The plaintiff's counsel proposed to put in the proceedings under the commission of bankrupt, to prove the trading, petitioning creditor's debt, and act of bankruptcy.

Russell, Serjt., for the defendant. These proceedings are not evidence. This action never could have been brought by the bankrupt, as he never made any demand of the return of the goods.

Campbell, for the plaintiff. The words of the stat. 6 Geo. 4, c. 16, s. 92, (a) are "any debt or demand for which the *bankrupt might have sustained a suit." Now, as the bankrupt here had a right to require the return of these goods at any time he pleased, I submit that this is a "demand" for which the bankrupt might have sustained a suit. [542]

Mr. Justice PATTESON. If that were not so, this section of the act of parliament would not apply to the case of a bill of exchange not due.

Godson. Or to a promissory note payable on demand.

Russell, Serjt. If, to come within the operation of this section of the act of parliament, it is sufficient that the bankrupt could have maintained the action, if he had done something which he in fact never did, where are we to stop?

Mr. Justice PATTESON. I think it is not necessary that the "demand" should have been such as was perfect in the bankrupt at the time of his bankruptcy. The only cases in which it was intended to allow the assignees to be put to strict proof of the bankruptcy, were those in which the bankruptcy was itself almost a part of the cause of action, such as cases of fraudulent preference, or the like. But here it is immaterial whether the bankrupt or the assignee brings the action.

The evidence was received.

Verdict for the plaintiff. The Jury finding the value of the goods to be 14*l.*(b)

**Campbell*, and *Godson*, for the plaintiff.

Russell, Serjt., and *R. V. Richards*, for the defendant.

[*543]

[Attorneys—*Hughes*, and *Woodward*.]

(a) By which it is enacted "That if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

(b) As to actions of detinue see Com. Dig. tit. *Detinue*; Id. tit. *Pleader*, 2 X; Selw. N. P. tit. *Detinue*.

BEFORE MR. JUSTICE BOSANQUET.

REX v. DAVID DUNN. *March 8.*

Any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to *that person*, although that person was not in any authority as prosecutor, constable, or the like.

LARCENY. The prisoner was indicted for stealing a hymn-book, the property of Eliza Thompson. (a)

A witness, named Fieldhouse, proved, that the prisoner wished to sell the book to him, and that he told the prisoner he had better tell where he got it.

Mr. Justice BOSANQUET. You must not tell us what he said.

Scott, for the prosecution. This witness was not a person in any authority.

Mr. Justice BOSANQUET. Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for *544] him to confess, will exclude a confession subsequently made *to another person, is very often a nice question; but it will always exclude a statement made to the same person. (b)

The evidence was rejected.

Verdict—Guilty.

Scott, for the prosecution.

[Attorneys for the prosecution—Roberts & Son.]

(a) The hymn-book was stolen from a dissenting chapel, which was broken into, but the offence was not laid as sacrilege, it being considered by the prosecutor, that the stat. 7 & 8 Geo. 4, c. 29, s. 10, did not extend to dissenting chapels. In the stat. 7 & 8 Geo. 4, c. 30, s. 8, where the Legislature intended to include dissenting chapels, they have used different words. See those sections in Carr. Supp. p. 209, and p. 289.

(b) In the case of Rex v. Slaughter, for arson, tried on the same day, Mr. Justice Bosanquet rejected a confession made by the prisoner to one of his fellow workmen, who had told him it would be better for him to confess. See the cases of Rex v. Gibbons, 1 C. & P. 97, and Rex v. Tyler, 1 C. & P. 129.

REX v. THOMAS CROCKETT. *March 10.*

A person who was told by the surgeon that she would never recover, said, that she "hoped he would do what he could for her, for the sake of her family." He again told her that there was no chance of her recovery:—Held, that this showed such a degree of hope in her mind, as to render a statement she then made inadmissible as a declaration *in articulo mortis*.

MURDER. The prisoner was indicted for the murder of Jane White, by administering corrosive sublimate to her.

It was proposed to give in evidence a declaration of the deceased, as a declaration *in articulo mortis*. With a view of showing the state of the deceased, Mr. Sheward, a surgeon, who was called as a witness, said, "I had told the deceased she would not recover, and she was perfectly aware of her danger; I told her I understood she had taken something, she said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said, she hoped I would do what I could for her for the sake of her family. I told her there was no chance of her recovery."

Mr. Justice BOSANQUET. This shows a degree of hope in her mind. To render a declaration of this kind admissible, the deceased must have had the *545] impression on her *mind of an almost immediate dissolution. This will not do, I must strike the whole of this evidence out of my notes.

Verdict—Not guilty.

Godson, and Lee, for the prosecution.

[Attorney—Parker.]

See the cases cited in Carr. Supp. p. 232, and the cases of Rex v. Pike, 3 C. & P. 598; Rex v. Van Butchell, 3 C. & P. 629; and Rex v. Lloyd, ante, p. 233.

STAFFORD ASSIZES.

BEFORE MR. JUSTICE PATTESON.

REX v. FLETCHER and Others.

If one employed to carry goods for hire, appropriate them to his own use, but does not break bulk, this is no larceny, although the person so employed were not a common carrier, but was only employed in this particular instance.

THE indictment charged two of the prisoners, named Fletcher and Mellor, with stealing various articles of wearing apparel, books, &c., the property of Gilbert Hordern; and a third prisoner, whose name was Beardmore, was charged with receiving the articles, knowing them to have been stolen.

The prosecutor stated that the goods were in packages, and that he had directed the two prisoners, Fletcher and Mellor, to carry them to the house of the father of the prisoner, Fletcher, who was to keep them safely. The prosecutor also stated that the goods were to be conveyed in his cart, but that the horse belonged to Fletcher and Mellor, who were to be paid for what they did. It was proved that the goods were not taken to the house of Fletcher's father, but were found at the house of Beardmore, having been taken out of the packages in which they had been packed by the prosecutor.

**Meeson*, for the prisoners, objected that this was not a larceny.

Greaves, for the prosecution. These goods were delivered to the prisoners, Fletcher and Mellor, for a special purpose. [*546]

Mr. Justice PATTESON. There is no evidence that the packages were opened while the goods were in the possession of the two prisoners, who are charged as principals; and a carrier cannot be guilty of larceny, unless he breaks bulk.

Greaves. These persons were not common carriers, they were merely employed in this particular instance.

Mr. Justice PATTESON. They carried for hire. It is proved that they were to be paid for taking these goods. There is the case of a captain of a ship, which is a very strong authority on this point. (a) The prisoners must be acquitted.

Verdict—Not guilty.

Greaves, for the prosecution.

Meeson, for the defence.

(a) *Rex v. Madox, R. & R. C. C. R. 92.* In that case the captain of a ship disposed of several casks of butter, which formed part of his cargo, for his own benefit; and afterwards pretended to the consignees that he had been obliged to throw them overboard. This was held no larceny. In 1 Curw. Hawk. p. 143, it is said "It has been resolved that even those who have the possession of goods by the delivery of the party, may be guilty of felony, by taking away part thereof with an intent to steal it, as if a carrier open a pack, and take out part of the goods."

*REX v. WESTWOOD and Others. March 15.

[*547]

A prisoner was indicted for night poaching, and it was proposed to show that, on the occasion in question, one of the prosecutor's game-keepers had lost his coat, and that it was found in the prisoner's house. There was another indictment against the prisoner for stealing the coat:—Held, that this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny.

INDICTMENT on the stat. 9 Geo. 4, c. 69, s. 9, for poaching in the night, with other persons armed, to the number of more than three, in certain inclosed land of Edward John Littleton, Esq.

To prove the identity of the prisoner Westwood, *Talbot*, for the prosecution, proposed to show, that one of the game-keepers of Mr. Littleton lost his coat

during an affray which occurred on the occasion in question, and that this coat was found in the prisoner Westwood's house.

Greaves, for the prisoners, objected to the reception of this evidence, as there was a separate indictment against the prisoner Westwood for the stealing of this coat. And he cited the case of *Rex v. Smith*, 2 C. & P. 633.

Mr. Justice PATTESON. In the case of *Rex v. Ellis*, 9 D. & R. 174, it was held that where several felonies form parts of one transaction you may give evidence of them all.

Greaves. In that case there was only one indictment.

Mr. Justice PATTESON. That distinguishes the two cases; and I therefore shall not receive the evidence, unless the prosecutor consents to an acquittal on the indictment for larceny.

The evidence was rejected.

Verdict—Guilty.

Talbot, for the prosecution.

Greaves, for the prisoners.

[Attorneys—*Kean* and *Jones*.]

**REX v. SWATKINS* and Others. *March* 16.

[*548

In opening a case of felony the counsel for the prosecution ought not to state any particular expressions supposed to have been used by the prisoner, nor the precise words of any confession, but he may state the general effect of what the prisoner said.

A prisoner was in the custody of A., a constable; B., another constable, coming into the room, A. left it, and the prisoner immediately made a confession to B.:—Held, that if the prisoner was in custody as an accused party, that A. must be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to B. is receivable in evidence; but if it appear that the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it will not be necessary to call A. If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the Court.

An indictment, on the stat. 7 & 8 Geo. 4, c. 30, s. 17, charged a party with setting fire to a "stack of barley, of the value of 100*l.* of R. P. W.:"—Held good, although the words of the statute creating the offence are "any stack of *corn* or *grain*:"—Held also, that the words "of R. P. W." sufficiently stated the property:—Held also, that if the indictment state that the prisoner, on, &c., at, &c., feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of the value of 100*l.* of R. P. W. then and there being," this is sufficient, without stating that the prisoner, on, &c., at, &c., feloniously, unlawfully, and maliciously did then and there set fire to the stack.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 17, for maliciously setting fire to "one stack of barley, of the value of 100*l.*, of Richard Powell Williams." (a)

C. Phillips, for the prosecution, in opening the case, was proceeding to state certain expressions used by the prisoners.

Godson, *Carrington*, and *F. V. Lee*, objected, that, in opening a case of felony, confessions ought not to be stated; because it often turned out, that the words, as proved by the witness, materially differed from those put into the brief; and it also frequently happened, that, from something which had previously occurred, the statement was rendered inadmissible altogether.

C. Phillips, *contrâ*. If the counsel for the prosecution has a right to open a case, I know of no law which prevents him from stating any evidence, that he is instructed that he shall have to lay before the Jury.

Godson, in reply. We do not put it as a matter of strict law; but, what I submit is, that, in practice, confessions ought never to be opened.

*549] Mr. Justice PATTESON (having conferred with Mr. *Justice Bosanquet). My learned Brother and myself are of opinion, that the correct practice is for the counsel for a prosecution, in a case of felony, not to state any expressions that are supposed to have been made use of by a prisoner, or the exact

(a) The indictment was in the form given in *Jerv. ed. of Arch. C. L.* p. 262.

words of any supposed confession; but we think that he may state their general effect.

A constable was called, to prove a confession made to him by the prisoner Swatkins. This constable stated, that he went into a room in a public-house, at Imley, where he found the prisoner Swatkins, in the custody of another constable; and that, as soon as he (the witness) went into the room, the other constable left it, and the prisoner immediately made a statement.

Godson and Carrington, for the prisoner Swatkins, objected, that, before this statement was receivable, the other constable must be called, to prove whether he had held out any inducement to the prisoner to make this statement; and that if, without calling that constable, the evidence were receivable, the most dangerous consequences would ensue, as nothing would be more easy than for one constable to hold out the inducement to confess, and another to come into the room and receive the confession.

C. Phillips and Talbot, contra. If we call the person to whom the confession is made, and he did not hold out any inducement to the prisoner to confess, that is all that is necessary on the part of the prosecution; and if it is to be suggested, that any one else held out any such inducement, it is incumbent on the prisoner to show that. If it were not so, it would never be possible to prove a confession, without calling every constable in whose custody the prisoner had been.

Mr. Justice PATTESON. It appears, that the constable, who had this prisoner in custody, left the room *immediately on this person's coming in, and that the prisoner at once began to make a statement. Now, I think, as [*550 the witness did not caution the prisoner not to confess, it would be unsafe to receive such evidence. It would lead to collusion between constables.

Another witness was called, who stated, that, at the time of the confession before mentioned, the prisoner was not kept in custody as an accused party; but that all the servants of Mr. Williams had gone to Imley, to be examined as witnesses respecting this fire; and that the prisoner Swatkins having attempted to run away, the constable had caught him, and was detaining him as an unwilling witness.

Mr. Justice PATTESON. If he was not under any charge, that varies the case. As he was at the time attending there as a witness, and was not in custody on any charge, I shall receive the statement in evidence, without putting the prosecutor to call the other constable.

The constable to whom the confession was made was recalled. He said, that he had held out no inducement to the prisoner, to confess, and that he wrote down what the prisoner said, and having read it over to the prisoner, the latter put his mark to the paper.

This paper was put in, and read by Mr. Bellamy, the Clerk of Assize. (a)

**Godson and Carrington*, for the prisoner Swatkins. This indictment is not good. It charges the prisoner with setting fire to a "stack of barley," which is not the offence created by the statute 7 & 8 Geo. 4, c. 30, s. 17, that being the setting fire to any stack of *grain*, the word barley not occurring in that act. It must appear on the face of the record, that the prisoners have committed the offence created by the statute, and this can only be done by following the words of the statute. It is not enough to use terms that would be commonly understood. In an indictment for horse-stealing, it would not be enough to charge the stealing of a hunter or a racer, nor would it be sufficient, in an indictment for sheep-stealing, to call the animal stolen, a teg, or to call an ewe and lamb, a couple; which are names well understood; it being necessary to describe the offence in the terms of the statute creating it. There is

(a) Where a confession has been signed by a prisoner, it is read by the officer of the Court; but, where the examination is taken down by some person, and not signed by the prisoner, the person who took it down is called as a witness, and he states what the prisoner said, refreshing his memory from the paper. This was done by a magistrate, in the case of *Rex v. Jones*, Carr. Supp. 13; and by a magistrate's clerk, who had taken down what a prisoner said before the committing magistrate, in the case of *Rex v. Watkins*, tried before Mr. Justice Bosanquet, at the Oxford Spring Assizes, 1831.

also another objection, which is, that the stack is neither stated to be "of the goods and chattels" of the prosecutor, nor "the property" of the prosecutor, which ought to have been done; it is merely stated to be a "stack of barley of Richard Powell Williams."

F. V. Lee, for the other prisoners. In this indictment, there is an omission of the words "then and there." It states, that they, on such a day and at such a place, "feloniously, unlawfully, and maliciously, did set fire to a certain stack of barley, of Richard Powell Williams, then and there being." Now it ought to charge, that the prisoners, "feloniously, unlawfully, and maliciously, did *then and there* set fire to a certain stack of barley."

C. Phillips, and *Talbot*, *contrâ*. With respect to the last objection, of the omission of the words "then and there;" that, if it ever was an objection, is aided by the stat. 7 Geo. 4, c. 64, s. 20, which relates to defects in the statement of the time and the venue. And with respect to the stack being described as a *552] stack of barley, that is *stating the offence with a sufficient certainty, to inform the prisoner what he is charged with. The question is, whether barley is grain, which it undoubtedly is. It is said, that the offence must be charged in the words of the statute creating it. It is not, however, in all cases sufficient to follow the words of the statute; for, where the words are general, the species must be specified, as was held in a case of maiming cattle;(a) and if we had charged this as a setting fire to a stack of grain, it would have been objected, that the species of grain ought to have been specified. With respect to the remaining point, the statement that it is the stack of Richard Powell Williams, that is tantamount to alleging it to be his property.

Mr. Justice PATTESON. The only question is, whether I am bound to take judicial notice that barley is either corn or grain.(b)

His Lordship having conferred with Mr. Justice Bosanquet, said—I do not *553] think that the objection respecting the *omission of the words "then and there," is tenable; and I think that the statement of the property is sufficient. I also think that the charging the offence as the setting fire to a stack of barley, is likewise sufficient; but if, on further consideration, I should think that there is any weight in that objection, I will reserve it for the consideration of the Judges.(c)

The Jury found the prisoners Swatkins and Lloyd—Guilty, and Timmins—Not guilty.

C. Phillips, and *Talbot*, for the prosecution.

Godson, and *Carrington*, for the prisoner Swatkins.

F. V. Lee, for the prisoners Lloyd and Timmins.

[Attorneys—*Bourne*, for the prosecution; *Barber*, and *Passman*, for the respective prisoners.]

The prisoners Swatkins and Lloyd were afterwards executed.

(a) *Rex v. Chalkley*, R. & R. C. C. R. 258.

(b) It may be proper to observe, that barley is mentioned as corn, in several acts of parliament, which relate to the importation of corn; for example, by the stat. 55 Geo. 3, c. 26, s. 3, it is enacted, that foreign corn, meal, or flour, may be imported for home consumption, "whenever the average prices of the several sorts of British corn made up and published in the manner now by law required shall be at or above the prices hereafter mentioned, that is to say, whenever wheat shall be at or above the price of eighty shillings per quarter; whenever rye, peas, and beans, shall be at or above the price of fifty-three shillings per quarter; whenever barley, beer, or bigg, shall be at or above the price of forty shillings per quarter; and whenever oats shall be at or above the price of twenty-seven shillings per quarter." It should also be observed, that, in indictments for maiming cattle, the indictment always charges the maiming to be of "a certain cow," or the like, and never uses the word "cattle;" and, in the case of *Rex v. Chalkley*, before cited, it was held, that the charging of the party with maiming "certain cattle," without specifying what species of cattle, would not be sufficient.

(c) At the Reading Spring Assizes, 1831, William Brown was charged with having maliciously set fire to a stack of straw. It appeared that the wheat had been cut and carried, and that the stubble had been mown off, and made into the rick in question; and this was called by the witnesses, a haulm rick. It was objected, that this was not a stack of straw, as the material of which it was made was not straw. Mr. Justice Patteson said, he would not stop the case, as it might be argued that every part of the stalk of the corn, when cut, was straw; but that, if the prisoner was convicted, he would reserve the point, as he considered it of great importance, that it should be decided whether stacks of this kind were within the act of parliament or not.

*SHROPSHIRE ASSIZES.

[*554]

BEFORE MR. JUSTICE PATTESON.

PRATT v. THOMAS.

The proper stamp to be borne by a written instrument must depend on what is the leading character of such instrument.

A., by deed, demised lands to B., and this deed contained a covenant by C. to pay the rent. The deed bore a stamp of 1*l.* 10*s.*, which was the proper stamp for it, as a lease:—Held, in an action of covenant against C., for non-payment of the rent, that this stamp was sufficient, and that the deed did not require a 1*l.* 15*s.* stamp.

COVENANT. Plea—*Non est factum*. The deed was put in. It was a lease of lands to a person named Hammond, to which the defendant was a party, the latter merely covenanting for the payment of the rent. The deed bore a lease stamp of 1*l.* 10*s.*, which was the proper stamp for it as a lease.

Talfourd, for the defendant, objected that this stamp was not sufficient; and that, to make this deed available against the defendant, as a deed of covenant, it ought to bear a 1*l.* 15*s.* stamp.

Mr. Justice PATTESON. I think that this stamp is sufficient. This deed is a lease, and this covenant is only ancillary to it. The question is, what is the leading character of the instrument. Verdict for the plaintiff.

Russell, Serjt., and Whateley, for the plaintiff.

Talfourd, for the defendant.

[Attorneys—Roberts, and Green.]

*MINSHALL v. EVANS. March 22.

[*555]

A plea *puis darrein continuance* stated, that, since the last continuance, the plaintiff had recovered a judgment for the same cause of action. The affidavit to verify this plea stated the time at which the judgment was recovered, which, by reference to the *Nisi Prius* record, appeared to be not since the last continuance:—Held, that this affidavit did not verify the plea, and that the plea could not be received.

DEBT on bond. On the part of the defendant, a plea *puis darrein continuance* was put in. It stated, that, since the last continuance, the plaintiff had obtained two judgments, and that those judgments were for the debt now sued for. To this plea was annexed an affidavit, stating (*inter alia*) that, on the 17th of April, 1829, the plaintiff recovered these judgments.

Jervis, and Whateley, for the plaintiff, contended, that this plea was bad; as it appeared by the record that there was a continuance since these judgments were recovered.

Russell, Serjt., and R. V. Richards, *contrâ*. If that be so, that is matter of demurrer in the Court above.

Jervis, and Whateley. The affidavit to verify the plea states the judgments to have been obtained in April 1829. Now, by the *Nisi Prius* record, it appears that that is not since the last continuance.

Mr. Justice PATTESON. Generally, an affidavit to verify a plea *puis darrein continuance* merely states that the plea is true in substance and matter of fact. However, that is not the case here; and in this affidavit the dates of the judgments are stated. The averment in the plea is, that, since the last continuance, these judgments were recovered. Now, the affidavit states the time at which they were obtained; and, by looking at the *Nisi Prius* record, I find that to be

not since the last continuance. I am of opinion, that this plea is not sufficiently verified by the affidavit, and I shall therefore not receive it.

The case was proceeded in, and there was a verdict for the plaintiff.

*556] **Jervis, and Whateley, for the plaintiff.*

Russell, Serjt., and R. V. Richards, for the defendant.

[Attorneys—*Minshall, and Griffiths.*]

See the cases of *Pascall v. Horsley*, 3 C. & P. 372, and *Bartlett v. Leighton*, Id. p. 408.

HEREFORD ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

DOE on the Demise of LEWIS v. PREECE. *March 24.*

In an ejectment, a person who has had possession of the property is not a competent witness for the defendant, to prove that he (the witness) has held it for more than 20 years, because, if the lessor of the plaintiff recovered, the witness would be liable to an action for mesne profits.

EJECTMENT for a house, &c. It appeared that the house had originally belonged to Josias Preece, who, by his will, had devised it to his daughter Betty Preece, who had conveyed it to a person named Davis, by whom it had been mortgaged to the lessor of the plaintiff.

The defendant, whose name was Thomas Preece, was the grandson of Josias Preece.

Godson, for the defendant, opened, that he should prove that Catherine Preece, a granddaughter of Josias Preece, had had the possession of this house from the time of the death of her grandfather, which was a period of 40 years, and that she had held it by the permission of the defendant and his father. To prove this, Catherine Preece was called.

Russell, Serjt., and Talfourd, for the plaintiff, objected, that she was not a competent witness, because, as she had been in possession of the house, she would be liable in an action for mesne profits, if the lessor of the plaintiff succeeded.

*557] **Godson, contrà.*—She is not the defendant on this record. If the lessor of the plaintiff recovered, his action for mesne profits would be against the present defendant, Thomas Preece, and not against her.

Mr. Justice BOSANQUET. I think that she is not a competent witness.

She was not examined.

Verdict for the plaintiff.

Russell, Serjt., and Talfourd, for the lessor of the plaintiff.

Godson for the defendant.

[Attorneys—*Collins, and Godson.*]

TURBERVILLE v. PATRICK. *March 25.*

If a Court of equity directs an action of trover to be brought, and orders that the defendant shall admit the finding and the conversion of the goods. This does not give the defendant the right to begin.

TROVER for goods. Plea—General issue.

This was an action of trover brought by order of the Vice-Chancellor, to try

the validity of a commission of bankrupt, which had issued against the plaintiff and, by the order of the Vice-Chancellor, the defendants were to admit the finding and conversion of the goods.

Campbell, for the defendant. I submit that I have a right to begin. By the Vice-Chancellor's order, I am bound to admit the plaintiff's right to recover, unless I can make out a case in answer. This is exactly like the case of an ejectment by an heir-at-law against a devisee, who may, if he pleases, admit the title of the heir-at-law, and begin by setting up the will.

Mr. Justice BOSANQUET. If the Vice-Chancellor had intended that this action should not be tried in the ordinary way, he would have directed an issue, and have made the present defendant the plaintiff in the issue. I think the plaintiff must begin.

Verdict for the defendant.

**Ludlow*, Serjt., *Curwood*, and *Clive*, for the plaintiff.

Campbell, and *Russell*, Serjt., for the defendant.

[*558]

[Attorneys—*Anderson & H.*, and *Bodenham & Co.*]

BEFORE MR. JUSTICE PATTESON.

REX v. PAYNE and Another. *March 26.*

If a person strike another with a bludgeon, and break the skin and draw blood,—this is a sufficient wounding to be within the stat. 7 & 8 Geo. 4, c. 31, s. 11 & 12. Under that stat. it is not at all material what the instrument is, with which the party is wounded.

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 11 & 12, for wounding Richard Whitlocke, with intent to murder him, &c.

It appeared, that one of the prisoners had struck the prosecutor on the head with a bludgeon, that the skin was broken, and that blood flowed; but it also appeared, that the prosecutor, who was a game-keeper in the service of Mr. Hanbury, had overtaken the prisoners in a road, and had insisted on searching their pockets before the blow was given.

Mr. Justice PATTESON. If a person strike another with a bludgeon, and breaks the skin and draws blood, and this occur under such circumstances, that, if death had ensued, the offence would have amounted to murder, it will be a wounding within this act of parliament; and it is not at all material what the instrument is. This ought to be generally known.

His Lordship directed an acquittal, on the ground, that, if death had ensued, the offence would only have amounted to manslaughter. Verdict—Not guilty.

Talbot, for the prosecution.

[Attorney—*Collins.*]

See the cases of *Rex v. Wood*, *ante*, p. 381, and *Rex v. Withers*, *ante*, p. 446.

*GLOUCESTER ASSIZES.

[*559]

BEFORE MR. JUSTICE PATTESON.

REX v. BOWYER and Others. *April 4.*

An indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 10, for damaging a vessel, need not state the damage was done "otherwise than by fire," if it state how it was done. Whether a small pleasure boat, 18 feet long, is a vessel within the meaning of that stat.—*quære*. *Semble*, that it is.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 10, (a) for damaging a certain vessel, by beating a hole in the bottom of it, with intent to render it useless.

The vessel in question was a small pleasure boat, the property of Colonel Berkeley; and one of the witnesses stated, that it was about 18 feet long, and that two men could have carried it.

W. J. Alexander, for the prisoners. I submit that this boat is not a vessel within this section of the act of parliament. It will be seen, by a reference to the previous section and to the subsequent section of the same statute, (b) that the Legislature meant to apply the terms "ship or vessel," only to such vessels as are likely to be underwritten, and not to small boats; and in the stat. 7 & 8 Geo. 4, c. 29, s. 17, (c) where it was meant to include boats, the words used are "vessel, barge, or boat," clearly making a distinction between a boat and a vessel; and it is quite clear that the Legislature could never have intended to put *560] the "damaging a little boat of this kind on the same footing as the damaging a large ship. There is also another objection, which is, that there is no allegation in this indictment, that the damage was done "otherwise than by fire," which is necessary under this section of the act of parliament.

Mr. Justice PATTESON. It is said to be, by beating a hole in the bottom of the boat.

Curwood, for the prosecution. It must no doubt be shown that the damage was done otherwise than by fire, but that may be by stating how the damage was done. With respect to the question, whether a boat is a vessel: In Bailey's Dictionary, a boat is defined to be "a vessel for sea or river;" a ship, "a sea boat or vessel for sailing," and a vessel is stated to be "a ship, barge, hoy, lighter, &c." Dr. Johnson says, in his Dictionary, that a vessel is "any vehicle in which men or goods are carried on the water;" and this is the definition of Sir Walter Raleigh, who was a very great seaman. If this were not so, what protection would there be for all the canal boats? And with respect to these boats being put on the same footing as the large ships, it is clear that the Legislature contemplated that there might be a great difference in the offences, as the punishment under this section of the act of parliament is quite in the discretion of the Court.

W. J. Alexander, in reply. I do not put it, that, taking the word vessel as a nautical term, a boat may not be included in it; but here it is matter of legislative description; and I submit that it was in this act of parliament only meant to apply the word vessel to such vessels as might be underwritten.

Mr. Justice PATTESON. Would you say that this act of parliament applied to a canal barge?

*561] *W. J. Alexander*. I do not say that it would not; that might be underwritten.

Mr. Justice PATTESON. That the term vessel would, in common parlance, include this boat is clear; but whether, in this act of parliament, it was meant to include such boats, is the question.

W. J. Alexander. In the stat. 7 & 8 Geo. 4, c. 29, the 18th sect. (d) relates to ships or vessels cast away, &c., not mentioning boats, while the section next before it mentions boats and barges, clearly putting the words vessel and boat in contradistinction in the very same act of parliament.

Mr. Justice PATTESON. I incline to think that this boat is within this clause of the act of parliament; but as the word vessel must have the same construc-

(a) By which it is enacted, "That if any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, if the Court shall so think fit, in addition to such imprisonment."

(b) These sections are set forth in Carr. Supp. pp. 210 & 212.

(c) Set forth in Carr. Supp. p. 298.

(d) Set forth in Carr. Supp. p. 299.

tion in all other acts of parliament, it might lead to inconvenience; and therefore, if necessary, I will take the opinion of the Judges upon it. (a)

Verdict—Not guilty.

Curwood, and *Cripps*, for the prosecution.

W. J. Alexander, for the defence.

[Attorneys—*Blossome & Co.*, and *Lucas*.]

(a) In the stat. 6 Geo. 4, c. 108, s. 52, which relates to offences connected with smuggling; the words used are "any vessel or boat," treating a boat as distinct from a vessel. However, in sect. 6 of the stat. 33 Geo. 3, c. 67, for which s. 10 of the stat. 7 & 8 Geo. 4 was substituted, the words are, "If any seaman or seamen, keelman or keelmen, caster or casters, ship carpenter or ship carpenters, or other person or persons, shall maliciously destroy or damage any ship, keel, or other vessel, otherwise than by fire," &c.

*REX v. BOUCHER. April 8.

[*562]

A letter was signed "I am your Cut-throat," and stated, that if the person to whom it was sent had his deserts, he would not live the week out; and that the writer would be with him shortly, and if he made light of it, the writer would make light of him and his:—Held, that this letter so plainly conveyed a threat to kill and murder, as to render it unnecessary to insert either innuendoes or prefatory allegations in the indictment, to explain its meaning.

INDICTMENT on the stat. 4 Geo. 4, c. 54, for sending a letter, threatening to kill and murder Robert Collier. (a)

The letter was addressed "Collier, Esq., Savings Bank, Cheltenham," and was sent by post to Mr. Collier, who was an attorney at Cheltenham, and secretary of the Savings Bank there. The letter was as follows:—

"Sir,—You are a rogue, thief, and vagabone, and, if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care, old chap, or you shall disgorge some of your ill gotten gains, watches, and cash that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours.

I am your

CUT-THROAT."

"March 15th, 1831."

Curwood, and *Carrington*, for the defence. There is nothing in this letter that imports any threat to kill or murder Mr. Collier, it is all hypothetical:—"If you had your deserts, you would not live the week out, &c." And with respect to the signature Cut-throat, that cannot be called in aid; for, by the act of parliament, the threat must be in the letter and not in the signature; because the act of parliament speaks of the signature as distinct from the letter itself. (b) If the letter does not contain in distinct terms *a threat to kill and murder, [*563 this indictment is not sufficient; for if the words are of ambiguous meaning, there ought to be an *innuendo* to explain them; and if it is intended to be said, that something was meant by the words more than their ordinary import, it is necessary that there should be a prefatory allegation. This was decided in the case of *Goldstein v. Foss*. (c)

Mr. Justice PATTESON. I think that this letter very plainly conveys a threat

(a) The indictment was in the form given in Jerv. ed. of Arch. Cr. Pl., p. 46.

(b) By the stat. 4 Geo. 4, c. 54, it is enacted, "That from and after the passing of this act, if any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, out-houses, barns, stacks of corn or grain, hay or straw, or shall procure, counsel, aid, or abet the commission of the said offences, or of any of them, or shall forcibly rescue any person being lawfully in custody of any officer or other person, for any such offences; every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for such term, not less than seven years, as the Court shall adjudge, or to be imprisoned only, or imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years."

(c) 2 C. & P. 252, and Add. p. iii. and 1 M. & P. 402.

to kill and murder. No one who received it could have any doubt as to what the writer meant to threaten.

The prisoner was acquitted on the facts of the case.

Justice, and *Busby*, for the prosecution.

Curwood, and *Carrington*, for the defence.

[Attorneys—*Collier*, and *Ward*.]

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*HOME SPRING CIRCUIT. 1831.

BEFORE MR. BARON BAYLEY AND MR. BARON GARROW.

HERTFORD ASSIZES.

BEFORE MR. BARON GARROW.

REX v. WEBB and GODDARD. *March 3.*

A prisoner, when before the committing magistrate, was sworn by mistake, he being supposed to be a witness; as soon as the mistake was discovered, the deposition which was begun was destroyed and the prisoner cautioned. After this he made a statement:—Held, that such statement was receivable in evidence.

THE prisoners were indicted for arson. For the prosecution, a statement made by one of the prisoners before a magistrate was offered in evidence; and the committing magistrate was called to prove it. He stated upon cross-examination, that when this prisoner was first brought before the magistrate, it was thought he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition which had been commenced was torn. The prisoner subsequently made a statement, after having been cautioned by the magistrate; and that statement was now offered in evidence.

Ryland, for the prisoners, objected to this being received in evidence. The whole examination before the magistrate was but one transaction; and an oath having been administered to him, it was binding during the whole inquiry:—

*565] This statement, therefore, was to be considered as *having been made upon oath, and consequently was not receivable in evidence.

GARROW, B. What was first taken down and afterwards destroyed does not prejudice the prisoner; we do not know what he said; it is as if it never had existed.

The evidence was received and the prisoners were convicted.

Adolphus, and *Dowling*, for the prosecution.

Ryland, and *Robinson*, for the prisoners.

MAIDSTONE ASSIZES.

BEFORE MR. BARON GARROW.

REX v. COLLISON. *March 16.*

Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending, as soon as they could get assistance, to secure them: one of the watchmen walked beside the prisoner, and the other watchman beside the other person, at some distance from the prisoner. The other person wounded the watchman who was near him:—Hold, that the prisoner could not be convicted of this wounding unless the Jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting, with extreme violence, any person who might attempt to apprehend them.

THE prisoner was indicted for an assault and wounding, with intent to murder. There were other counts in the indictment varying the intent, but no count charging it to have been with intent to resist apprehension.

It appeared, that the prosecutor and another man, on the night mentioned in the indictment, had been employed by a gentleman named Rider, as watchmen about his premises; and that, in the course of the night, they saw two carts driven by the prisoner and another man, which contained apples; and that, suspecting them to have been stolen, they walked on with the prisoner and his companion, intending to accompany them until they could obtain assistance to take them into custody. The prisoner and one of the watchmen walked at some distance from the others, *and while they were so going along, the prisoner's companion stepped back, and with a bludgeon which he carried [*566 with him, struck and wounded the watchman with whom he had been walking, and inflicted on him several most severe bruises.

GARROW, B. To make the prisoner a principal, the Jury must be satisfied, that, when he and his companion went out with a common illegal purpose of committing the felony of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal.

Verdict—Not guilty.

Clarkson, and *Rider*, for the prosecution.

Espinasse, for the prisoner.

See the case of *Rex v. Hawkins*, 3 C. & P. 392, and the authorities there cited.

REX v. FAGG. *March 17.*

If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, and he should be then asked, if he has anything to say in answer to the charge.

THE prisoner was indicted for arson.

The counsel for the prosecution offered in evidence a statement in writing made by the prisoner before the magistrates, and which it appeared he had made before the evidence in support of the charge had been gone through.

GARROW, B., inclined strongly to think that it was inadmissible. His Lordship observed, that nothing which *a prisoner stated, before he knew what the evidence against him was, ought to be used to criminate him; [*567

censured the practice of taking such a statement from a prisoner, who should be asked, if he wished to say anything in answer to the charge, when he heard all that the witnesses in support of it had to say against him. His Lordship, however, admitted the evidence, but expressed his doubts as to legality. The prisoner was acquitted.

Adolphus, and *Baker*, for the prosecution.
Clarkson, for the prisoner.

68] *NORFOLK SPRING CIRCUIT. 1831.

BEFORE MR. JUSTICE GASELEE AND MR. JUSTICE ALDERSON.

BUCKINGHAM ASSIZES.

BEFORE MR. JUSTICE ALDERSON.

WELLS v. HEAD. *Aylesbury, March*.

The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off:—Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in protection of his property.

ACTION for shooting the plaintiff's dog. It was proved, that the dog had worried some sheep belonging to the defendant; but it appeared that he had left the field in which the sheep were, had crossed an adjoining close, and was in a third when the defendant shot him.

ALDERSON, J., said, that whatever the provocation to shoot the dog might be, yet the verdict must pass for the plaintiff, for it was clear that the dog was not shot in protection of the defendant's property, as it was after he had left the field in which the sheep were. But, though there could not be a verdict for the defendant, the habits of the dog might be considered in mitigation of damages. Verdict for the plaintiff. Damages—One Guinea.

Storke, Serjt., and *Bligh*, for the plaintiff.

Kelly, and *Praed*, for the defendant.

[Attorneys—*Parchell*, and *James*.]

*CAMBRIDGE ASSIZES.

BEFORE MR. JUSTICE ALDERSON.

REX v. WILLIAM SMITH. *March 15.*

An indictment for setting fire to a barge, the property of another, ought to contain an averment that it was done with intent to injure the owner.

THE prisoner was indicted for having wilfully and maliciously set fire to a

barge, the property of Henry Stevens. There was no averment that the prisoner did it with intent to prejudice, &c.(a)

ALDERSON, J., was of opinion that such an averment was necessary.

Gunning, for the prosecution, submitted that the indictment was sufficient without it, and referred, in support of his opinion, to the form in Archbold's Criminal Law, in which no such allegation was contained.(b)

ALDERSON, J., observed, that at least it would have been safer to have had it; but said, that he would confer with Mr. Justice Gaselee on the point, and if he agreed with him, he would reserve the case for the opinion of the Judges.

Mr. Justice GASELEE, on being consulted, was of opinion that the indictment was insufficient. But the Jury *acquitted the prisoner upon the merits, and therefore, any further consideration of the point became unnecessary.(c) [*570]

Gunning, for the prosecution.

Smith, for the prisoner.

(a) By the stat. 7 & 8 Geo. 4, c. 30, s. 9, it is enacted, that "if any person shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

(b) See title "*Arson*," p. 175; but see also Jervis's edit. p. 261.

(c) Mr. Justice Alderson intimated, that, if the prisoner had been convicted, he should have reserved, for the opinion of the Judges, the question whether a barge was a vessel within the meaning of the act of parliament. See *Rex v. Bowyer*, ante, p. 559.

NORFOLK ASSIZES.

BEFORE MR. JUSTICE ALDERSON.

REX v. PARRATT. *Thetford, March 17.*

The captain of a vessel said to one of his sailors suspected of having stolen a watch—"That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle—You are a damned villain, and the gallows is painted in your face:"—Held, that a confession made by the sailor after this threat was not receivable in evidence on his trial for the felony.

THE prisoner was charged with having robbed John Field of his watch at Clay-next-the-sea. It appeared that he was a mariner on board a vessel called the *Abeona*, belonging to Newcastle. The watch was found by the mate of the vessel concealed in the cable, and given by him to the captain. Two hours after this, the captain said to the prisoner—"Parratt, that unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle. You are a damned villain, and the gallows is painted in your face." Upon this the prisoner made a confession, which *Preston*, for the prosecution, proposed to offer in evidence.

Palmer, for the prisoner, submitted that, after such a threat, no statement of the prisoner's could be received.

ALDERSON, J., was of that opinion, and the confession was not admitted.

Preston, for the prosecution.

Palmer, for the prisoner.

*571]

***REX v. ELIZABETH POWELS.**

A prisoner was indicted for mixing sponge with milk, and administering it with intent to poison. The indictment was held insufficient, because it did not aver that the sponge was of a deleterious or poisonous nature.

THE prisoner was indicted for having mixed a quantity of sponge (cut into small pieces) with milk, and given it to her husband, with intent to poison him.

An objection was taken to the indictment, on the ground that it did not set forth that the sponge was of a deleterious or poisonous nature.

The learned Judge was of opinion that the objection was good, and the prisoner was acquitted.

REX v. QUINCH.

It is the duty of a coroner in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death.

THE prisoner was indicted for the manslaughter of W. Abel. It appeared that the prisoner and the deceased quarrelled, and the deceased provoked the prisoner to fight. After they had fought several rounds, the deceased fell, was conveyed away, and soon after died, before any surgeon arrived to give him assistance. An inquest had been held upon the body, but no surgeon was examined before the coroner.

ALDERSON, J., animadverted on this omission on the part of the coroner,^(a) and observed, that, in the absence of the testimony of the surgeon, it was impossible to say to what cause the death of the deceased was to be attributed.

The prisoner was acquitted.

^(a) We were subsequently informed that a surgeon was in attendance at the inquest, but, being anxious to be set at liberty, was allowed to depart to attend to his professional duties.

*572] ***OLD BAILEY MAY SESSION. 1831.**

BEFORE MR. JUSTICE LITTLEDALE, AND MR. JUSTICE BOSANQUET.

REX v. WILLIAM PEARSON. May 17.

A person employed at a receiving-house of the General Post-Office, to clean boots, &c., and to assist in tying up the letter-bag, is not a servant of the post-office, within the stat. 52 Geo. 3, c. 143, s. 2.

A receiving house is not a *post-office* within that statute, but it is "*a place for the receipt of letters*;" and the whole shop is to be considered as the "place for the receipt of letters," and not the mere letter-box; and therefore, if a person take a letter and put it on the shop counter of the receiving house, or give it to one of the persons belonging to the shop there, that is putting the letter into the post.

In an indictment on this stat. it was alleged, that a letter was "to be delivered at T." The letter was addressed "*T. house*," which was a house in the parish of T.:—Held, sufficient. To constitute the offence of stealing a letter from a place for the receipt of letters under sect. 3 of this act, it is essential that the letter should be carried out of the shop which was the place for the receipt of letters; and, therefore, if a person take a letter and steal its contents, without taking the letter out of the shop, that is not an offence within this section of the act of parliament.

INDICTMENT on the stat. 52 Geo. 3, c. 143.^(a) The *first* count stated that

^(a) By the stat. 52 Geo. 3, c. 143, s. 2, it is enacted—"That if any deputy, clerk, agent, letter carrier, post-boy, or rider, or any other officer or person whatsoever, employed by or under the Post Office of Great Britain, in receiving, stamping, sorting, charging, carrying,

the prisoner was employed by and *under the General Post Office of Great Britain, in receiving letters brought to a certain receiving house, [573] situate in the Middle Temple; and that, on the 19th of April, 1 Will. 4, a letter containing ten bank notes, of the value of 10*l*. *each, came to the hands of the prisoner, while he was so employed, and that he did feloniously [574] secrete and embezzle the same. In this count the notes were stated to be the property of Messrs. Gosling. The *second* count was similar, except that it charged the prisoner with stealing the notes out of the letter. The *third* and *fourth* counts were similar to the first and second, stating the notes to be the property of John Folliott Powell. The *fifth* and *sixth* counts were similar to the third and fourth, except that they stated the notes to have been in a packet instead of a letter. The *seventh* count charged the prisoner with stealing from and out of a certain post-office, situate, &c., a certain other letter which had been put into the said post-office, "to be delivered to a certain person at Turvey, in the county of Bedford, to wit, John Folliott Powell." The *eighth* count was exactly the same as the seventh, except that, for the words "post-office," the words "place for the receipt of letters," were substituted. The *ninth* and *tenth* counts were similar to the seventh and eighth, only charging the thing stolen to be a packet. The *seventh*, *eighth*, *ninth*, and *tenth* counts did not state the prisoner to have been in the employ of the Post-office. The *eleventh* and *twelfth* counts were common larceny counts for stealing the notes; the former laying the property in Mr. Folliott, the latter in Messrs. Gosling.

Before the case was gone into, *Denman*, A. G., abandoned all the counts which were framed on sect. 2 of the act of parliament, (b) and relied on those which were framed under the third section of the statute, (c) stating that it might be doubted whether a receiving house was a post-office.

conveying or delivering letters or packets, or in any other business relating to the said office, shall, after the passing of this act, secrete, embezzle, or destroy any letter or packet, or bag or mail of letters with which he or she shall have been intrusted in consequence of such employment, or which shall in any other manner have come to his or her hands or possession, whilst so employed, containing the whole or any part or parts of any bank note, bank post bill, bill of exchange, exchequer bill, South Sea or East India bond, dividend warrant, either of the Bank, South Sea, East India, or any other company, society or corporation, navy or victualling, or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draft, bill, or promissory note whatsoever for the payment of money; or shall steal and take out of any letter or packet with which he or she shall have been so intrusted, or which shall have so come to his or her hands or possession, the whole or any part or parts of any such bank note, bank post bill, bill of exchange, exchequer bill, South Sea or East India bond, dividend warrant, either of the Bank, South Sea, East India, or any other company, society, or corporation, navy or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or certificate, bank receipt for payment of any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit or note for or relating to the payment of money, or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of money; every person so offending, being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

By sect. 3 of the same stat. it is enacted—"That if any person shall, after the passing of this act, steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of Great Britain, or from or out of any post office, or house or place for the receipt or delivery of letters or packets, or bags or mails of letters sent or to be sent by such post, any letter or packet, or bag, or mail of letters, sent or to be sent by such post, or shall steal and take any letter or packet out of any such bag or mail, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; and such offences shall and may be inquired of, tried, and determined, either in the county where the offence shall be committed, or where the party shall or may be apprehended."

It should be observed that, under sect. 3, it is not essential that the letter should contain any thing valuable, or that the party should be at all connected with the Post Office, both of which are necessary to constitute the offences created by sect. 2. In the case of *Rex v. Brown*, R. & R. C. C. R. 32, n., it was held, that a person who has an employment in the Post Office may be convicted of stealing a letter under sect. 3 of this act.

(a) These were the first six counts of the indictment.

(b) These were the seventh and eighth counts.

It appeared that Mr. Abram, by whom the prisoner had been employed as a
 *575] servant to clean boots and shoes, &c., *carried on the business of a law
 stationer, at a shop in Middle Temple Lane, that being a receiving house
 of the General Post Office. It also appeared, that the prisoner used to assist in
 tying up and sealing the post-office bag. It was proved, that, on the 19th of
 April, Messrs. Gosling sent ten bank notes of 10*l.* each, in a letter, addressed
 —“J. F. Powell, Esq., Turvey House, Newport Pagnell;” and one of their
 clerks stated, that he took this letter to Mr. Abram’s shop, but whether he put
 it into the letter-box, or gave it to a person in Mr. Abram’s shop, he was not
 certain; but he stated the latter to be his usual practice. The letter never
 reached Mr. Powell; and on the 22d of April, one of the 10*l.* notes was found
 in a boot, in a room of a house opposite to Mr. Abram’s shop, in Middle Tem-
 ple Lane, in which it was the prisoner’s duty to clean the boots and shoes of
 Mr. Abram and his family. This note the prisoner acknowledged having put
 into this boot.

C. Phillips, for the prisoner. The Attorney-General has admitted, that those
 counts of the indictment which charge the prisoner as a servant of the Post
 Office, cannot be sustained. My first objection as to the rest of the case there-
 fore is, that there is a variance between the indictment and the evidence. It is
 proved that the letter was addressed to Mr. Powell at Turvey House; now the
 indictment states it to be Turvey, and not Turvey House.

Denman, A. G. The eighth count states, that the letter was to be delivered
 to a certain person at Turvey in the county of Bedford, to wit, John Folliott
 Powell.

Mr. Powell, being recalled, said, that his house was called Turvey House, and
 that it was in the parish of Turvey, but that it was about a quarter of a mile
 from the village of that name.

*576] *Mr. Justice LITLEDALE. Suppose a letter directed No 1, New
 Square, Lincoln’s Inn, would it not be sufficient to state that it was to
 be sent to Lincoln’s Inn?

C. Phillips. The next objection is, that this is charged as the stealing of a
 letter out of the receiving house. Now, I take it that nothing is more clear,
 that the removal from the house must be complete; and if the Jury should
 think that the prisoner opened the letter in Mr. Abram’s shop, and stole the
 contents, that will not be enough. This is like the case of *Rex v. Thompson*,
 where it was held, that, to constitute a stealing from the person, the removal of
 the property must be complete; although, to constitute a simple larceny, the
 smallest removal is sufficient. (a)

Mr. Justice LITLEDALE. This is a question that must be left to the Jury.

C. Phillips. There is a third objection. To constitute this offence, it is
 essential that the letter should have been put into the post. Now, here, the
 witness does not know whether he did not go into the shop, and give it into
 *577] some person’s hand; and I contend, that unless the *letter found its way
 into the letter-box or letter-bag, it will not be sufficient.

Mr. Justice LITLEDALE. If the banker’s clerk took the letter and laid it
 on Mr. Abram’s counter, or if one of the persons belonging to the shop received
 it into his hand, I think it is enough; I look on the whole room as the place for
 receiving letters, and not the mere box.

The prisoner was called on for his defence.

(a) In the case of *Rex v. Walsh, R. & M. C. C. R. 14*, the prisoner had lifted up a bag
 from the bottom of the boot of a coach, but was detected before he had got it out. It did not
 appear that it had been entirely removed from the place it had at first occupied in the boot, but
 the raising it from the bottom had completely removed each part of it from the space that spe-
 cific part had occupied. This was held to be a sufficient asportation to constitute a simple lar-
 ceny. In the case of *Rex v. Thompson, Id. 78*, which was an indictment for larceny from the
 person, the prosecutor had secured his pocket-book in an inside front pocket of his coat; he
 felt a hand between his coat and waistcoat, and his pocket-book was just lifted out of his
 pocket, when he forced the book down again into his pocket. This was held to be not enough
 to constitute a stealing from the person, but was sufficient to constitute a simple larceny, and
 judgment was given accordingly.

Mr. Justice LITLEDALE (in summing up). I think that there is no evidence to show that the prisoner was a servant of the Post Office; and it also appears to me, that this place was not a post office within the meaning of the act of parliament, but that it was a place for the receipt of letters. In these receiving houses there is always a letter-box; but if a person chooses to go into the shop, and lay his letter down on the counter, I think that is sufficient to satisfy the act of parliament, as I consider the whole shop as the "place for the receipt of letters." This, therefore, would support the eighth count of this indictment. There was also an objection raised, that the indictment stated that this letter was to be delivered at Turvey, whereas the direction upon it is Turvey House; we think that there is nothing in that objection; for if it is to be delivered at Turvey House, that is a delivery at Turvey, as Turvey House is in the parish of Turvey. Another objection was, that there is no evidence that the prisoner ever took the letter out of the shop. That I think is a question for your consideration. Before you can convict the prisoner upon the eighth count of this indictment, you must be satisfied that he took the letter out of the shop; you will therefore consider whether he opened the letter in the shop, or whether he took the letter out of the house to the room in the other house, in which he cleaned shoes, and opened it there. One would think he would hardly *have opened the letter in Mr. Abram's shop, where he might have been seen, when he [*578] could so easily have taken it to the other house, and have opened it so much more privately. With respect to the notes, you will consider whether the prisoner stole them. With reference to this, we find that he used to assist in tying up the letter-bag, and that shortly afterwards he put one of the notes into a boot. If you think he stole the notes, you must at all events find him guilty of the larceny; and then you must consider whether he opened the letter in Mr. Abram's shop, or whether he took the letter out of the shop and opened it elsewhere; and, if the latter, it will be your duty also to convict him of the other part of the charge.

Verdict—Guilty of stealing the 10*l.* note which was found in the boot, and not guilty of the residue of the charge.

Denman, A. G., Gurney, Shepherd, and R. Scarlett, for the prosecution.

C. Phillips, for the prisoner.

[Attorneys—Peacock, and Harmer.]

IT being afterwards ascertained, that the eleventh and twelfth counts did not conclude—"against the form of the statute," Mr. Justice LITLEDALE said, that the judgment must be respited. (a)

(a) Where the stealing was no felony at common law, but is made so by statute, it is necessary that the indictment should conclude *contra formam statuti*; but where the offence was a felony at common law, and a statute merely increases the punishment, as in the cases of horse-stealing, sheep-stealing, and the like, it is unnecessary. See Jerv. Arch. Cr. Law, p. 52. The stat. 7 Geo. 4, c. 64, s. 20, enacts that no judgment upon any indictment or information for any felony or misdemeanor shall be stayed or "reversed" for the insertion of the words 'against the form of the statute' instead of the words 'against the form of the statutes' or *vice versa*. That, therefore, would be only an objection upon demurrer; but this enactment does not extend to cases where the *contra formam statuti* is omitted altogether. [*579]

BEFORE THE HONOURABLE CHARLES EWAN LAW, COMMON SERJEANT.

REX v. DEELEY.

In an indictment for bigamy, the second wife was described as "E. C. widow." She was in fact not a widow, nor had she ever been represented or reputed to be so.—Held, a fatal variance.

THE prisoner was indicted at the February Sessions, 1831, for feloniously intermarrying with "Elizabeth Chant, *widow*," his former wife being alive.

The first marriage was proved, and it was proved that the first wife was alive. To prove the second marriage, Elizabeth Chant was called. She stated that she was not a widow, and had never been married before her marriage with the prisoner; she also stated, that she had never represented herself as a widow, nor was she ever treated as such, nor did she know that the prisoner had described her as a widow, till she had "the marriage lines."

Prendergast, for the prisoner, objected, that this was a fatal variance. The indictment described the prosecutrix as a widow, which in fact she not only was not, but it was even proved that she had never been known as a widow, or represented as such.

THE COMMON SERJEANT reserved the point for the consideration of the Judges, and the prisoner was found Guilty.

*580] *May 19.* The COMMON SERJEANT now delivered the opinion of the Judges, who held that this was a fatal variance, and that the prisoner could not be legally convicted on this indictment; and that, although it might have been unnecessary to have given any addition to Elizabeth Chant, yet a wrong addition was fatal, as being a part of the *designatio personæ*.

Prendergast, for the prisoner.

In the case of *Rex v. Tennent*, tried before Mr. Justice Lawrence, O. B. 1805, the prisoner was indicted for a burglary in the house of Mr. Shawe, and stealing therein money, bank notes, bills of exchange, &c., to the amount of 4000*l.* and upwards; the property was laid in Mr. Shawe, who was described in the indictment as an esquire. Mr. Shawe stated that he was an attorney; but he also stated, that he frequently had letters and papers addressed to him in the name of "Robert Shawe, Esquire;" and that that was a description by which he was known. The Learned Judge allowed the case to proceed, and the prisoner was convicted, and executed. Mr. *Gurney*, and Mr. *Watson*, were of counsel for the prosecution. Mr. *Alley*, and Mr. *Gleed*, for the defence.

For this note, we are indebted to the kindness of one of the learned counsel engaged in the case.

See also the case of *Rex v. Ogilvie*, 2 C. & P. 230.

*581] *COURT OF KING'S BENCH.

FIRST SITTINGS AT WESTMINSTER, IN EASTER TERM, 1831.

BEFORE MR. JUSTICE TAUNTON.

COOPER v. PHILLIPS. *April 22.*

A. had several of his children residing in a house distant from his own, in the charge of B., a servant:—Held, that if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, and although the accident might have arisen from the carelessness of the servant:—Held, also, that if B., the servant, becoming ill in consequence of the service, call in C., a surgeon, and after this A. send his own surgeon, and the wife of A. know of C.'s attendance, and expresses no disapprobation, A. is liable to pay C. for this attendance.

A servant who hurt her foot in getting over a gate called in a surgeon, who was not the regular medical attendant of the family, without the knowledge of her master or mistress:—Held, that the master was not liable to pay the surgeon's bill.

ASSUMPSIT for a surgeon's bill. The plaintiff's claim consisted, *first*, of a sum of 2*l.* 2*s.*, for reducing a dislocation of the wrist of one of the defendant's children; *second*, of a sum of 7*s.* 6*d.* for attending a servant of the defendant, named Ellen Read, who had hurt her ankle in getting over a gate; and *third*, of a sum of about 12*l.*, for attending Susan Parry, who had acted as wet nurse to two of the defendant's children.

It appeared that the defendant and his wife resided at a distance of about a mile and a half from a house near the Regent's Park, in which the youngest eight of their children were living, under the charge of Susan Parry, who had acted as wet nurse to two of their youngest children. It appeared that the defendant's wife was in the habit of coming to see the children three or four times a week, but no evidence was given as to when the defendant was at that house. It further appeared, that the youngest child, having dislocated its wrist, was taken to *the plaintiff, who reduced the dislocation, and performed a cure. It was proved that the defendant's wife knew that he did so, [*582 but that she said the defendant was to know nothing about it.

It also appeared that Susan Parry was attacked by inflammation of the bowels, which the medical men stated arose from her suckling the defendant's youngest child, she having only just before weaned another child of the defendant's, for which she had also been employed as wet nurse. For this complaint she was attended by the plaintiff; but it was admitted, that the defendant did not know the plaintiff, and that Mr. Berry was the surgeon who regularly attended the defendant's family. It was also proved, that the defendant had asked Mr. Berry to see Susan Parry, and had sent her 10s. to pay for medicines, as Mr. Berry was a consulting surgeon. Evidence was also given to show that the defendant's wife knew of the plaintiff's attendance on Susan Parry, and did not express any disapprobation of it.

Sir *J. Scarlett*, for the defendant. I submit, that where a person has a regular medical man, neither his servant nor even his wife has any authority to send for another medical man without his direction. It is clear, that the defendant never gave any authority to call in the plaintiff; for, as to the attendance on the child, he was not to know of it; and with respect to Susan Parry, he sent his own medical man to see her; and he gave her money to pay for medicines. No servant, as I submit, has a right to send for what medical man he pleases, and charge his master. If a servant is taken ill, the master ought to provide proper medical attendance; and it is reasonable that he should do so. But, though I admit that the master of a family is bound to provide medical attendance for his servants and his family, still it is he that must do it, and they must not call in whomever they please on the credit *of their master. I do not mean, that if an accident happens to a person's child in [*583 the street, a medical man must not be called in immediately; but that, in the case of an illness of a servant, the master ought to be informed of it.

Gurney, in reply. The defendant in this case had eight of his children at a distance from his own residence; and I contend, that if, on an emergency, a wife, or even a servant, send for a medical man, that medical man is entitled to be paid. Even if the servant carelessly let the child fall out of her arms, and it was necessary to send for a surgeon, the defendant would be liable to pay his bill. It is said, that the defendant was not to be told of the accident. There is no proof that the plaintiff knew of that; but this he knew, that the defendant's wife was aware of his attendance, and did not express any disapprobation of it. As to the charge for the servant, who was hurt in getting over a gate, I shall abandon that. With respect to that part of the case which regards Susan Parry, she was not in the house in which her master was, and when ill she sent for a medical man. Now, I submit, that, in point of law, if a servant be taken ill in my house, more especially if that illness was caused in my service, I am not only morally, but legally, liable to pay for necessary medicines for that servant.

Mr. Justice TAUNTON. As to the charge of 7s. 6d. for attending Ellen Read, it appears to me that the plaintiff has not made out his case; she got the hurt in getting over a gate, and the plaintiff, who was not the regular medical man of the family, did not attend her by the desire of the defendant or his wife; and, for anything that appears, it might even have been without the knowledge of the plaintiff or his wife. With respect to the charge for setting the wrist of the defendant's child, I think that the plaintiff is entitled to recover. If the

*584] father of a family *lives at a distance from the place at which his children are, and puts them under the protection of servants, I am of opinion, that if any accident occurs to one of the children, even from the carelessness of the servant, the father of the family is bound to pay for the medical attendance on such child. With respect to that part of the bill which relates to the attendance on Susan Parry, it appears that her illness arose in the defendant's service, and that the defendant was informed of it, and that he sent Mr. Berry to see her. This shows that he considered himself liable to take care of her in this illness; and it is also shown, that his wife knew, and did not disapprove of the plaintiff's attendance; and I think it must be taken, that the defendant's wife had the general superintendence of this house. It therefore appears to me, that, for this part also of the charge, the defendant is liable.

Verdict for the plaintiff. Damages—10*l*.

Gurney, and *Herbert Jones*, for the plaintiff.

Sir J. Scarlett, and *Hutchinson*, for the defendant.

[Attorneys—*E. Pain*, and *Carlton*.]

See the case of *Sellen v. Norman*, *ante*, p. 80, and the authorities there cited.

*585] SECOND SITTINGS AT WESTMINSTER, IN EASTER TERM, 1831.

BEFORE MR. JUSTICE TAUNTON.

BEAMON *v.* ELLICE, Esq. April 30.

If the carriage of A. strike against the cart of B., and a person who sees it demand the address of the owner of the carriage, the address given by a person in the carriage is admissible in evidence; but a statement that any damage done will be paid for is not so.

In an action for negligent driving, a plan, which is to be put into the hands of the witnesses, should merely show the street, the pavement, the turnings, corners, &c., and not the supposed position of the carriages; but, if it does so, the Judge will not allow it to be used.

The witnesses had been all ordered out of Court, but one of them came into Court again, and heard the evidence of another witness. The witness who had so come back into Court was allowed to be examined as to such facts only as had not been spoken to by any other witness.

CASE, for an injury done to the plaintiff's cart, by the negligence of the defendant's coachman, in driving his carriage. Plea—General issue.

It appeared that the defendant's carriage, as it was proceeding through Long Acre, struck against the plaintiff's cart, and damaged it, and also broke some of the cart harness. One of the witnesses for the plaintiff ran after the carriage, in which were some ladies, and demanded the address of its owner.

Erskine, for the defendant. I submit that what these ladies said, is not evidence.

Mr. Justice TAUNTON. I think that the address they gave is evidence.

The witness.—They gave their address, 44 Upper Seymour Street, and said, that any damage would be paid for.

Mr. Justice TAUNTON. What they said about paying for the damage is not evidence.

Gurney, for the plaintiff, wished to put into the hands of the witnesses, a plan in this plan, there was not only a representation of the street, the pavements, &c., but it also *professed to represent the way in which the carriage and the cart came into collision; the cart being represented quite at the edge of the street, with one of its shafts over the foot pavement.

Erskine, for the defendant, objected to this plan, which he contended was, in

effect, a leading question; because, it was asking the witnesses—"Did not the carriages stand in those positions?"

Mr. Justice TAUNTON. I think it is objectionable. A plan should show the streets and the pavements, and any turnings or corners, but not the position of the carriages.

Gurney. I have seen, in cases of running down at sea, the ships represented on the plan.

Erskine. In those cases the position is in general not so material, and the question usually is, how the parties ought to have conducted themselves in such a state of circumstances.

Mr. Justice TAUNTON. This is too much of a picture. I think I ought not to receive it.

The plan was not used.

The witnesses on both sides had been ordered out of Court; however, after a short time, one of them, named Mary James, had returned into Court, and had heard another witness give his evidence.

Erskine, for the defendant, objected to her being examined.

Gurney, and *Greaves*, *contrd.* She is called to speak to a distinct part of the case, and not to state anything which has been spoken to by any other witness. The object in sending witnesses out of Court is, that they may *not all say just the same thing, because they have heard one another exa- [*587 mined, which cannot be the case where the witness speaks to entirely new facts.

Erskine. If the rule, that a witness who has been in Court cannot be examined after an order for witnesses to go out, is to be relaxed, it will always be a question whether the witness comes to speak to a new fact or not.

Mr. Justice TAUNTON. My difficulty is this: A witness called to prove new facts might be induced to vary his evidence, because he had ascertained that a witness whom he had heard examined had omitted to prove some particular fact. There is always a great deal of time lost by sending the witnesses out of Court; and I think, that, in general, it does not answer any good purpose. I shall receive the evidence, and allow Mr. *Erskine* to move it.

Erskine. I fear that I cannot; the Court will not interfere respecting the admission of a witness after such an order as this.

Mr. Justice TAUNTON. I shall give you leave to move to enter a nonsuit, in case the Court shall think that I ought not to have received the evidence of this witness.(a)

The witness was examined only to such facts as had not been spoken to by any witness that had previously been examined.(b)

Verdict for the plaintiff. Damages—3*l.* 14*s.*

**Gurney*, and *Greaves*, for the plaintiff.

Erskine, and *Bere*, for the defendant.

[*588]

[Attorneys—*Moore*, and *Howard*.]

(a) No motion for a nonsuit was ever made.

(b) In the criminal Courts of Scotland, no witness is allowed to be present, except the witness under examination. And the same rule prevails in the two Houses of Parliament. *Taylor v. Lawson*, 3 C. & P. 543; in which case Lord Chief Justice Best expressed his approbation of this practice.

In the case of the Attorney-General v. Bulpit, 9 Pr. 4, it is said, that, in the Court of Exchequer, it is "a sacred and inflexible rule, that, wherever there is an order of the Court that the witnesses intended to be examined on either side shall remain out of Court during the examination of the other witnesses, if any person who may give material evidence be present, contrary to that order, he cannot on any account be permitted to be examined."

In the case of *Pomeroy v. Baddeley*, which was tried at Exeter (R. & M. 430), Mr. Justice Littledale allowed the attorney in the cause to remain in Court, although he was to be a witness, and all the other witnesses were ordered out, the counsel stating that he could not go on without his assistance.

In the case of *Rex v. Webb*, 3 Stark. L. of Ev. 1733, Best, C. J., held, that, if a witness remained in Court after an order for all witnesses to withdraw, he could not be examined, although he was the attorney in the cause. But, in that case, it does not appear to have been mentioned to the Court, that his assistance was wanted in Court, as was done in the case of *Pomeroy v. Baddeley*.

However, in the case of *Rex v. Colley*, M. & M. 329, which was a case of burglary, tried at Taunton, the witnesses had been ordered out of Court, but one of them being called in to

produce a plan, remained in Court, and heard some of the evidence; and he was afterwards called as a witness, and objected to, because he had been in Court. For the prosecution, a case was cited, in which Bayley and Holroyd, Js., had held, on the Northern Circuit, that a witness who disobeyed the order might still be examined; and Littledale, J., after conferring with Gaselee, J., said, that it depended on the circumstances of the case, whether such a witness ought to be examined, and that he should receive this witness.

In the case of *Rex v. Brown*, which was a case of arson, tried at Reading, 1831, one of the prisoner's witnesses had, on an order being given for witnesses to leave the Court, gone out, but had afterwards come into Court again; Patteson, J., allowed him to be examined, notwithstanding that his evidence was objected to on the part of the prosecution.

***589] *THIRD SITTINGS AT WESTMINSTER IN EASTER TERM, 1831.**

BEFORE MR. JUSTICE TAUNTON.

DOE on the Demise of WILLIAMSON v. DAWSON. May 5.

If a lessor of the plaintiff is nonsuited for want of the defendant's confessing lease, entry, and ouster, the Judge will not grant a certificate under the stat. 1 W. 4, c. 70, s. 30, to give the lessor of the plaintiff immediate possession, unless an affidavit stating the circumstances of the case be laid before him.

Under that stat. the Judge has no discretion as to the time at which the lessor of the plaintiff shall have possession, as he must either grant a certificate to enable him to get immediate possession, or let the case take its regular course.

EJECTMENT, to recover the possession of a house. No one appeared on the part of the defendant, and the plaintiff was nonsuited, because the defendant did not confess lease, entry, and ouster.

Bodkin, for the lessor of the plaintiff, applied under the stat. 1 Will. 4, c. 70, s. 38, for a certificate to entitle the lessor of the plaintiff to recover immediate possession. He stated that it had been held by Mr. Justice Littledale, that where the case was not tried, and the learned Judge therefore knew nothing of the circumstances of it, it was necessary that an affidavit of the circumstances should be put in. He also stated, that he had an affidavit, by which it appeared that the defendant, Mrs. Dawson, had occupied the house, and kept it as a house of ill fame; but that, since the bringing of the present ejectment, it had been shut up and unoccupied, and was deteriorated in value by being so shut up.

Mr. Justice TAUNTON. Under this act of parliament, there does not appear to be any discretion in the Judge as to the time when the possession shall be delivered. He must either grant a certificate to enable the lessor of the plaintiff to get into immediate possession, or the case must take its regular course. I think upon that affidavit I may grant the certificate. (a)

Certificate granted.

***590] *Bodkin**, for the lessor of the plaintiff.

[Attorney—*Selby*.]

(a) By the stat. 1 Will. 4, c. 70, s. 38, it is enacted, "That in all cases of trials of ejectments at Nisi Prius, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the Judge before whom the cause shall be tried, to certify his opinion on the back of the record that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may be issued forthwith; and the costs may be taxed and judgment signed and executed afterwards at the usual time, as if no such writ had issued; provided always, that such writ, instead of reciting a recovery by judgment, in the form now in use, shall recite shortly that the cause came on for trial at Nisi Prius, at such a time and place, and before such a Judge (naming the time, place, and Judge,) and that thereupon the said Judge certified his opinion that a writ of possession ought to issue immediately."

SITTINGS AT WESTMINSTER, AFTER EASTER TERM, 1831.

BEFORE LORD TENTERDEN, C. J.

KNAPP and Another v. HASKALL. May 10.

If, in an action for work and labour, surveyors be called for the defendant, to prove that, in the year 1831, they surveyed the work, and that, in their judgment, the charges were 100*l.* too much:—Held, that a letter from the defendant's attorney, stating that the work had been surveyed in 1829, and that the charges were considered to be 60*l.* too much, is not admissible as evidence in reply.

ASSUMPSIT to recover the amount of a builder's bill for building houses.
Plea—General issue.

For the plaintiffs, evidence was given that the work was done, and the charges reasonable.

The defence was, that the charges were too high; and that the defendant had paid money to the plaintiffs sufficient to cover what the amount ought to have been. For the defendant several surveyors were called, who stated, that they had surveyed the houses in the year 1831, and that they considered the amount of the charges to be 100*l.* too high.

**F. Pollock*, for the plaintiff, wished to put in, as evidence in reply, a [591 letter from the defendant's attorney to the plaintiff, stating that the defendant had had a survey of the premises, in the year 1829, and that his surveyor thought the charges 60*l.* too much.

Sir J. Scarlett, contrd. This is not evidence in reply; it does not contradict my case. It does not show, that, in the year 1831, the value was not what my witnesses have stated; nor does it show that they never made any valuation.

F. Pollock. The defendant sets up this valuation as a fair one. Now, it is competent to me to show, that it is not so; for, in the year 1829, the defendant was setting up a different valuation.

Sir J. Scarlett. Suppose I had had more surveyors here, I need not have called them. If my friend had had twenty witnesses in attendance to prove any fact, he would select those that would best prove his case, and not call the others; and if he had meant to have relied on this letter, he should have put it in as part of his original case.

Lord TENTERDEN, C. J. I am of opinion, that this is not properly evidence in reply.

The evidence was rejected.

Verdict for the plaintiffs.

F. Pollock, and *Andrews*, for the plaintiffs.

Sir J. Scarlett, and *Hutchinson*, for the defendant.

[Attorneys—*Hammond & S.*, and *Watson*.]

See the case of *Rex v. Stimpson*, 2 C. & P. 415.

*REX v. FOWLE and ELLIOTT. May 10.

[592]

If an agreement, or other written instrument, be charged to be part of a fraud or other crime, it is immaterial whether it is stamped or not.

Semble, that an indictment, charging the defendants with conspiring "to cheat and defraud the just and lawful creditors of W. F." (without any further statement of the conspiracy, or of any overt act), is bad as being too general.

CONSPIRACY. The first count of the indictment was a special count, charging a conspiracy, with overt acts; but this count was abandoned, as some of the prefatory allegations of it could not be proved. The second count charged that

the defendants "did confederate, combine, and conspire, to cheat and defraud the just and lawful creditors" of the defendant Fowle.(a)

The counsel for the prosecution proposed to go on with the case upon this count.

Lord TENTERDEN, C. J. This count appears to me to be much too general. It does not state what was intended to be done, or the persons to be defrauded.
*593] I should be very sorry to give effect to so general a count *as this. However, I will not stop the case upon this point, for if I were to direct an acquittal, and this count should turn out to be good, the defendants might plead *autrefois acquit*.

The case proceeded. The counsel for the prosecution had opened that a part of the intended fraud was the setting up of a fraudulent assignment of a mortgage, which had not been executed till long after its date; and with a view of showing this, it was proposed to give in evidence a written agreement in the handwriting of the defendant Fowle.

Tomlinson, for the defendant Elliott, objected that this agreement was not stamped.

Lord TENTERDEN, C. J. If a written instrument is charged to be a part of a fraud, or other crime, I think, as at present advised, that it is immaterial whether it is stamped or not.(b)

The defendants were acquitted, because there was no evidence to go to the Jury as to the defendant Elliott.

Curwood, and Kelly, for the prosecution.

Tomlinson, for the defendant Elliott.

The defendant Fowle, in person.

[Attorneys—Matanle, and Abbott & Co.]

(a) This count was in the following form: "And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said W. F. and M. E., being such evil minded and fraudulent persons as aforesaid, to wit, on, &c., at, &c., with force and arms, did unlawfully confederate, combine, and conspire, to cheat and defraud the just and lawful creditors of the said W. F., to the evil example of all others in the like case offending, and against the peace of our lord the king, his crown and dignity." There were no overt acts charged.

In the case of *Rex v. Eccles*, 1 Leach, 274, an indictment for conspiring, by wrongful and indirect means, to impoverish H. B. and hinder him from exercising his business as a tailor, in Liverpool, without any overt act being charged, was held good; and Buller, J., said—"that nothing need have been stated about the means to be used, as that was matter of evidence." In the case of *Rex v. Gill*, 2 B. & A. 204, the indictment charged the defendants with conspiring "by divers false pretences and subtle means and devices to obtain and acquire to themselves, of and from P. D. and G. D., divers large sums of money, of the respective moneys of the said P. D. and G. D., and to cheat and defraud them respectively thereof." This was objected to as being too general, but was held good.

(b) See the case of *Vincent v. Cole*, 3 C. & P. 481, and the authorities there referred to.

*594]

*COURT OF COMMON PLEAS.

THIRD SITTINGS IN LONDON, IN EASTER TERM, 1881.

BEFORE MR. JUSTICE BOSANQUET.

PRESTWICH v. MARSHALL. May 10.

The endorsement by a married woman, with her husband's assent, of a bill of exchange drawn by her, is binding upon him, and will pass the interest in the bill to the endorsee so as to enable him to sue the acceptor.

ASSUMPSIT on a bill of exchange for 26l. 5s.

The first count of the declaration stated that one Lydia Bickerstaff made her
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certain bill of exchange, which the defendant accepted; and that the said Lydia, afterwards, to wit, &c., according to the usage and custom of merchants, endorsed the bill to the plaintiff. The *second* count stated, that one James Bickerstaff, by one Lydia Bickerstaff, his servant or agent in that behalf duly authorized, made his certain bill of exchange, which the defendant accepted; and that the said James afterwards, to wit, on, &c., at, &c., by the said Lydia, his servant or agent in that behalf duly authorized, according to the usage, &c., endorsed the bill to the plaintiff.

It appeared that Lydia Bickerstaff was a married lady, who kept a ladies' boarding school, and that the bill in question was given in payment for the education of the defendant's daughter. The body of the bill was in the handwriting of Mr. Bickerstaff, the husband, but the signature was that of Mrs. Bickerstaff, and the endorsement also. It was proved, that Mrs. Bickerstaff acted by her husband's authority; and that, on a former occasion, the defendant himself had said, when a bill was proposed as payment for a previous year, that it must be drawn by Mrs. B., as it would not answer if it was drawn by her husband. This former bill the defendant had paid. The present bill, with two others, was discounted for Mr. *Bickerstaff by the plaintiffs, and passed [*595 by them to Messrs. Lorkin & Pearson, without endorsement, and received back from Messrs. L. & P.

Andrews, Serjt., for the plaintiffs, relied on *Coates v. Davies*, (a) as an authority in their favour.

Cross, Serjt., for the defendant, contended that he was not liable to pay this bill to the endorsement of Mrs. Bickerstaff, as, by sending his daughter to the school, he became the debtor of Mr. Bickerstaff; and the debt would not be extinguished by the bill of exchange, without an endorsement by him. He relied on *Barlow v. Bishop*. (b)

BOSANQUET, J. I certainly shall not stop the cause upon this objection.

Cross, Serjt., then addressed the Jury, and contended, that, from the circumstance of the bill's not being endorsed, either by Mr. Bickerstaff to the plaintiffs, or by them to Messrs. Lorkin & Pearson, it was evident that it was not passed *bonâ fide*, but on an understanding that the plaintiffs were to be trustees for Mr. Bickerstaff, and, if *so, there was an answer to the action, as Mr. Bickerstaff could not have sued on the bill, because the defendant's [*596 daughter had not been properly treated at the school.

Evidence was about to be produced in support of this statement, as to the young lady's treatment, when—

Andrews, Serjt., objected, that the plaintiffs were clearly *bonâ fide* holders of the bill, and such evidence was therefore not admissible.

BOSANQUET, J., said, it was for the Jury to say, whether they were *bonâ fide* holders; and, if they were not, the evidence must be received.

The Jury said, that they were satisfied that the plaintiffs were *bonâ fide* holders.

Cross, Serjt., then requested that his Lordship would give him leave to move for a nonsuit on the question of law, as to the effect of the wife's endorsement.

BOSANQUET, J. I shall not give you leave to move. I will give you my opinion upon the question here. The wife's endorsement, if approved by the husband, is binding upon him; and it is positively proved in this case, that the

(a) 1 Camp. 485. That case decides, that if a promissory note is made payable to a married woman, and she endorses it for value in her own name, and the maker afterwards promises to pay it; in an action against him by the endorsee, it will be presumed that the nominal payee had authority from her husband to endorse the note in that form, and the endorsement will be considered as vesting a legal title to the note in the plaintiff.

(b) 3 Esp. 266, and 1 East, 432. In this case, it was held, that although a note was given to a married woman, knowing her to be such, with intent that she should endorse it to the plaintiff, in payment of a debt which she owed him (in the course of carrying on a trade in her own name with the consent of her husband, yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her endorsement to the plaintiff; neither could the plaintiff recover upon the money counts under such circumstances.

husband assented to the act of the wife. I am of opinion, that the plaintiffs are entitled to a verdict.

Verdict for the plaintiffs.

Andrews, Serjt., and *Chambers*, for the plaintiffs.

Cross, Serjt., and *Shee*, for the defendant.

[Attorneys—*Railton & M.*, and *Vincent*.]

*597]

*COURT OF KING'S BENCH.

FIRST SITTINGS AT WESTMINSTER, IN TRINITY TERM, 1831.

BEFORE MR. JUSTICE PATTESON.

WHITTINGHAM v. BLOXHAM. May 26.

If one, being the owner of a shop and goods, allow A. to be at this shop, and, in his own name, to sell and dispose of the goods as he pleases, and a portion of these goods be destroyed by the negligent driving of the coachman of B. while the servant of A. is carrying them; A. has such a qualified property in these goods as will entitle him to maintain an action on the case against B.

In an action for the negligent driving of the defendant's coach, the plaintiff gave evidence of the goods destroyed being in the possession of his servant. The witness who proved this was cross-examined with a view of showing the goods to be the property of P., and the defendant called witnesses to prove them the property of P.:—*Scmble*, that P. may be called as a witness in reply to prove that the goods were not his.

CASE for negligent driving. The *first* count of the declaration stated, that, on the 16th of November, 1830, the plaintiff was "lawfully possessed of certain goods and chattels (enumerating a number of plates, dishes, glasses, &c.) in the care and custody of one Timothy Foley," and that the defendant was possessed of a hackney coach, which his servant so negligently drove, that the coach and horses ran against the plaintiff's servant, whereby the goods were broken to pieces. A *second* count stated the goods to be in the possession of the plaintiff; and there was a *third* count, stating the goods to have been in the plaintiff's possession, and that the defendant drove the coach. Plea—Not guilty.

For the plaintiff, Timothy Foley was called; he stated, that the plaintiff kept a shop in Holborn, and that he, being his servant, had carried the goods in question, consisting of plates, glasses, &c., of the value of about 6*l.*, to Butchers' Hall, but that, as he was returning with them from Butchers' Hall, along Cheapside, on the 16th of November, the defendant's hackney coach drove against him, whereby the goods were broken and destroyed. In his cross-examination, he was asked if he did not know Mr. Phillips, and whether he did not know that the plaintiff was only a servant of Mr. Phillips at a weekly salary.

*598] The defence was, that the shop in Holborn belonged to a person named Phillips, who also carried on business in Newport Street; and that the plaintiff, who managed the shop in Holborn, was only his servant, at a salary of 2*l.* per week. It appeared, that, on the 16th of November, the words "The London Earthenware Company" were painted over the shop door, and not the plaintiff's name.

Sir J. Scarlett, for the plaintiff wished to call Mr. Phillips as a witness in reply.

Kelly, for the defendant. I submit that he is not a witness in reply. The plaintiff was bound to show the goods to be his, and I have cross-examined as to Mr. Phillips being the owner of these goods.

Sir *J. Scarlett*. I mean to contradict the defendant's case. His case is, that the goods belonged to Mr. Phillips. I call Mr. Phillips to contradict that statement, and to show that they did not belong to him. If a defendant make a specific case, the plaintiff may always answer that. In the case of a bill of exchange, where the defence is, that it was an accommodation bill, nothing is more common than for the plaintiff to go into evidence in reply, to show a consideration.

Hutchinson, on the same side. This would hardly have been evidence in the first instance. It is a negative: it is showing that the goods are not the property of Phillips.

Kelly. I would put this case: if, in an action on a bill of exchange, the handwriting of the defendant was proved by one witness; and I called ten witnesses to prove that it was not the defendant's handwriting, could the plaintiff go into fresh evidence of the handwriting? Now, in the present case, the plaintiff has attempted to prove these goods to be his property. I cross-examined to that *point, and I disprove it by my evidence; I therefore submit, that the plaintiff cannot give further evidence on this point. [599]

Mr. Justice PATTESON. The matter they mean on the part of the plaintiff to disprove is, that these goods were the property of Phillips, and not to show that they were the property of the plaintiff. In the case of *Rowe v. Brenton*, (a) a point of this kind arose, and there the Judges, after some hesitation, allowed the evidence to be given. I shall receive the evidence, but Mr. *Kelly* may move it.

Mr. Phillips was called. He stated, that the plaintiff was in fact the owner of the goods, and that the plaintiff bought goods of him to sell at the shop in Holborn; but that the plaintiff sent him the proceeds of the goods sold there, and drew 2*l.* a week, because he (Mr. P.) did not wish to excite envy in the minds of the other persons whom he employed.

Sir *J. Scarlett*, in reply contended, that, even admitting that Mr. Phillips was the real owner of the goods, yet, if the plaintiff was ostensibly the owner, and was allowed by Phillips to sell and dispose of them, that would give him such a qualified property in them as would enable him to maintain this action.

Mr. Justice PATTESON (in summing up). If the plaintiff was a mere servant of Phillips, the defendant will be entitled to the verdict; but if the goods were really the property of the plaintiff, or if, being the property of Phillips, he allowed the plaintiff, in his own name, to sell them and do what he pleased with them, in either of those cases, the plaintiff will be entitled to recover, if you are *satisfied that the accident arose from the negligence of the defendant's servant. You will, therefore, say whether these goods were the property of the plaintiff; and if you do not think that they were the plaintiff's absolute property, as between him and Phillips, you will then consider whether the plaintiff was allowed by Phillips to deal with these goods as his own, and whether Phillips had given him a power of disposing of them; for, if so, I think that that would be a sufficient property in the plaintiff to enable him to maintain this action. [600]

Verdict for the defendant. The foreman of the Jury adding, "we think the plaintiff had no property in the wares, and on that ground we find for the defendant."

Sir *J. Scarlett*, and *Hutchinson*, for the plaintiff.

Kelly, and *R. Matthews*, for the defendant.

[Attorneys—*C. Lewis*, and *Newton & Herberk*.]

(a) 3 M. & R. 133, see the case of *Knapp v. Haskall*, ante, p. 590.

Hutchinson afterwards moved to set aside the verdict, as being against the direction of the learned Judge in point of law. But the Court refused a rule, as the amount claimed was under 20*l*.

PROMOTIONS.

IN Easter Term, W. Walton, Esq., Barrister at Law, was appointed one of his Majesty's Counsel learned in the Law.

In Trinity Term, W. F. Boteler, Esq., and J. A. F. Simpkinson, Esq., Barristers at Law, were appointed his Majesty's Counsel learned in the Law.

REGULÆ GENERALES.(a)

[Trinity Term, 1 Will. 4, 1831.]

1. IT IS ORDERED, that a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. That, if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.(b)

*2. And it is further ordered, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and [*602 number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

3. And it is further ordered, That, if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification, and, if such bail are rejected, the defendants shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

4. And it is further ordered, That, if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognisance of such bail may be taken out of Court without other justification than such affidavit.

5. And it is further ordered, That the bail of whom notice shall be given, shall not be changed without leave of the Court, or a Judge.

6. And it is further ordered, That, with every declaration, if delivered, or with the notice of declaration, if filed, *containing counts in *indebitatus* [*603 *assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be com-

(a) These General Rules apply equally to the Courts of King's Bench, Common Pleas, and Exchequer, and make very considerable alterations in the practice of those Courts. It is, therefore, highly expedient that they should be in the hands of the profession as early as possible. They were promulgated when the concluding part of this volume was on the eve of publication. We have inserted them in it; as they would not, in all probability, be published in the Term Reports for some months.

(b) This and the four following rules make very great alterations respecting bail. By the last of them, the practice of putting in bail who were known to be unable to justify, and then of adding others who were intended to justify, must be discontinued, as now the bail put in cannot be changed without leave of the Court or a Judge. By the second rule, the residences of the bail for the last six months are to be specified in the notice of bail, and also whether they are housekeepers or freeholders, which will save a great deal of trouble; but the most important change will be produced by the third and fourth rules, which will have the effect, in most cases, of saving the bail the trouble and annoyance of attending to justify, if a proper affidavit in the form prescribed (p. 606) accompanies the notice of bail, because, if the opposite party compels them to appear to justify, it is at the risk of paying the costs.

prised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. AND, to secure the delivery of particulars in all such cases, IT IS FURTHER ORDERED, that, if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. AND that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the Judge's Marshal.(a)

7. And it is further ordered, That, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance.(b)

8. And it is further ordered, That no judgment of *non pros* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney, or agent, as the case may be.

*604] 9. And it is further ordered, That hereafter it shall not *be necessary to issue more than two summonses for attendance before a Judge, upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary.

10. And it is further ordered, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.(c)

11. And it is further ordered, That declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign, or first general return-day.

12. And it is further ordered, That, before taxation of costs, one day's notice shall be given to the opposite party.

13. And it is further ordered, That no rule to show cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognisances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognisances. Provided, That no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit* or *nil debet* or *non detinet*, with or without a plea of tender *as to part, a plea of the statute of limitations, set-off, bankruptcy *605] of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit proter*, infancy and coverture, or any two or more of such pleas shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.(d)

14. And it is further ordered, That these rules shall take effect on the first

(a) As the particular or statement to be delivered with the declaration must not exceed three folios, it will in many cases be rather an abstract of the plaintiff's claim than a particular.

(b) See the rule No. 10.

(c) See the rule No. 7.

(d) It should be observed, that this rule does not affect the *signing* of pleas, which is required as heretofore, but merely the *moving* to plead several matters, or to make several avowries or cognisances. It is much to be regretted that the signature of counsel to pleadings is not considered (as no doubt it originally was intended to be) as a sort of certificate by him that the pleas are such as ought to be put on the record. At present, the signing of pleadings is mere matter of form, and the counsel who signs them generally knows nothing of the case.

day of next Michaelmas Term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of October next.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDAL,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

**Form of Affidavit to accompany a Notice of Bail.*

[*606]

IN THE

BETWEEN, &c.

A. B., one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper [*or freeholder, as the case may be*] residing at [*describing particularly the street or place, and number, if any*]; that he is possessed of property to the amount of £ [the amount required by the practice of the Courts] over and above all his just debts; [*if bail in any other action, add "and every other sum for which he is now bail;"*] that he is not bail for any defendant except in this action [*or if bail in any other action or actions add "except for C. D., at the suit of E. F., in the Court of _____, in the sum of £ _____; for G. H., at the suit of I. K., in the Court of _____, in the sum of £ _____;" specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail*]; that the deponent's property, to the amount of the said sum of £ _____, [*and if bail in any other action or actions, "of all other sums for which he is now bail as aforesaid,"*] consists of [*here specify the nature and value of the property, in respect of which the bail proposes to justify, as follows:—*stock in trade, in his business of _____ carried on by him at _____, of the value of £ _____; of good book debts owing to him to the amount of £ _____; of furniture in his house at _____, of the value of £ _____; of a freehold or leasehold farm,^(a) of the value of £ _____, situate a _____, occupied by _____, *or of a dwelling-house of the value of £ _____, situate _____ at _____, occupied by _____, or of other property, par- [**607* ticularizing each description of property, with the value thereof]; and that the deponent hath for the last six months resided at _____ [*describing the place or places of such residence.*]

Sworn, &c.

REGULA GENERALIS.(b)

[Trinity Term, 1 Wil. 4, 1831.]

WHEREAS declarations in actions upon bills of exchange, promissory notes, and the counts, usually called the common counts, occasion unnecessary expense

(a) The words "freehold or leasehold farm" are printed as above in the copy of these rules published at the Rule Office of the Court of King's Bench; but it seems, that, if the person had a farm, he ought to specify whether it was freehold or leasehold, and not state it in the alternative.

(b) This rule applies to the Courts of King's Bench, Common Pleas, and Exchequer.

to parties, by reason of their length, and the same may be drawn in a more concise form: Now, for the prevention of such expense, IT IS ORDERED, That, if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant, shall be taxed *608] and *allowed to the defendant, and be deducted from the costs allowed to the plaintiff. AND IT IS FURTHER ORDERED, That, on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill. (a)

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDALE,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

Schedule of Forms and Directions.

FOR THAT WHEREAS the defendant, on the day of , in the year of our Lord , at London [or, in the county of], made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £ , days [weeks or months] after the date thereof, [or as the fact may be,] which period has now elapsed [or, if the note be payable *609] *to A. B.], and then and there delivered the same to A. B., and thereby promised to pay to the said A. B., or order, £ , days [weeks or months] after the date thereof, [or as the fact may be,] which period has now elapsed; and the said A. B. then and there endorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

WHEREAS one C. D., on the day of , in the year of our Lord , at London [or, in the county of], made his promissory note in writing, and thereby promised to pay the defendant, or order, £ , days [weeks or months] after the date thereof [or as the fact may be,], which period has now elapsed; and the defendant then and there endorsed the same to the plaintiff [or, and the defendant then and there endorsed the same to X. Y., and the said X. Y. then and there endorsed the same to the plaintiff], and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

WHEREAS one C. D., on , at London [or, in the county of], made his promissory note in writing, and thereby promised to pay X. Y., or order,

(a) The effect of this rule is, that, if counts on bills or notes, goods sold, &c., shall be longer than those given in the schedule, the attorney will have to pay the costs occasioned thereby. It appears by the directions given at p. 613, that these forms are intended to be applied *mutatis mutandis* to bills or notes payable at sight, and also to foreign bills.

£ , days [weeks or months] after the the date thereof [or as the fact may be], which period has now elapsed, and then and there delivered the said note to the said X. Y., and the said X. Y. then and there endorsed the same to the defendant, and the defendant then and there endorsed the same to the plaintiff [or, and the defendant then and there endorsed the same to Q. R., and the said Q. R. then and there endorsed the same to the plaintiff], and the said C. D. did not pay the amount thereof, although the same was *there presented to him on the day when it became due; of all which the defendant then [*610 and there had due notice.

WHEREAS the plaintiff on , at London [or in the county of], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff, £ , days [weeks or months] after the date [or sight] thereof, which period has now elapsed, and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof, but did not pay the same when due.

WHEREAS the plaintiff, on , at London [or in the county of], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to O. P., or order, £ , days [weeks or months] after the date [or sight] thereof, which period has now elapsed, and then and there delivered the same to the said O. P.; and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof; yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff; of all of which the defendant then and there had notice.

WHEREAS one E. F., on , at London [or in the county of], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. [or to H. G.] or order, £ , days [weeks or months] after sight [or date] thereof, which period is now elapsed, and the *defendant then and there accepted the said bill, and the said E. F. [or the said H. G.] then and there endorsed [*611 the same to the plaintiff [or, and the said E. F., or, the said H. G. then and there endorsed the same to K. J., and the said K. J. then and there endorsed the same to the plaintiff]; of all which the defendant then and there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

WHEREAS one E. F., on , at London [or in the county of], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ , days [weeks or months] after the sight [or date] thereof, which period has now elapsed, and the defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof.

WHEREAS the defendant, on , at London [or in the county of], made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the plaintiff, £ , days [weeks or months] after the sight [or date] thereof, and then and there delivered the same to the said plaintiff; and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same; of all which the defendant then and there had due notice.

WHEREAS the defendant, on , at London [or, in the county of], made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the order of the said defendant, £ , days [weeks or months] after the sight [or, date] *thereof, and the said [*612 defendant then and there endorsed the same to the plaintiff [or, and the said defendant then and there endorsed the same to L. M., and the said L. M. then and there endorsed the same to the plaintiff], and the same was then and

presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

AND WHEREAS one *N. O.*, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to his order £ _____, days [weeks or months] after the date [or, sight] thereof, and the said *N. O.* then and there endorsed the said bill to the defendant [or, to *R. S.*, and the said *R. S.* then and there endorsed the same to the defendant], and the defendant then and there endorsed the same to the plaintiff, and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

WHEREAS one *N. O.*, on _____, at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to the defendant or order £ _____, days [weeks or months] after the sight [or, date] thereof, and then and there delivered the same to the defendant, and the defendant then and there endorsed the said bill to the plaintiff [or, to *R. S.*, and the said *R. S.* then and there endorsed the same to the plaintiff], and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

***613]** **Directions for Declarations on Bills where Action brought after Time of Payment expired.*

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. *which period has now elapsed*; and, instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words denoting the time appointed for payment, the following words, viz. *and the said drawee* [naming him] *then and there saw and accepted the same, and the said period has now elapsed*; and, instead of alleging that the bill was presented for acceptance and refused, to allege, that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

If a note or bill be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

Declarations on foreign bills may be drawn according to the principle of these forms with the necessary variations.

***614]** **Common Counts.*

WHEREAS the defendant, on _____, at London [or, in the county of _____], was indebted to the plaintiff in £ _____, for the price and value of goods then and there bargained and sold [or, sold and delivered] by the plaintiff to the defendant, at his request.

And in £ , for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant, at his request :

And in £ , for money then and there lent by the plaintiff to the defendant, at his request :

And in £ , for money then and there paid by the plaintiff for the use of the defendant, at his request :

And in £ , for money then and there received by the defendant for the use of the plaintiff :

And in £ , for money found to be due from the defendant to the plaintiff, on an account then and there stated between them.

And whereas the defendant afterwards, on, &c., in consideration of the premises respectively, then and there promised to pay the said several moneys respectively to the plaintiff, on request ; Yet he hath disregarded his promises and hath not paid any of the said moneys, or any part thereof, To the plaintiff's damage of £ ; and thereupon he brings suit, &c.

**Direction as to the General Conclusion.*

[*615

If the declaration contains one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said last mentioned several moneys respectively.

GENERAL RULE

OF THE

COURT OF EXCHEQUER.

[Trinity Term, 1 Will. 4.]

WHEREAS, since the statute of the 7th & 8th Geo. 4, c. 71, instances have occurred in which, upon proceedings in the Court of Exchequer by way of *subpoena* and attachment, defendants have been arrested upon writs of attachment, notwithstanding the same have not issued for a bailable cause of action ; and it is desirable that such practice shall be discontinued. IT IS THEREFORE ORDERED, that, from henceforth, *no arrest shall be made* upon any such writ of attachment, unless the same shall be for a *bailable *cause of action*, and shall be *duly marked and endorsed for bail.*(a) [*616

31st May, 1831.

LYNDHURST,
J. BAYLEY,
W. GARROW,
J. VAUGHAN,
W. BOLLAND.

(a) This general rule makes a most important alteration in the practice of the Court of Exchequer. Before the making of this rule, if a defendant did not appear within four days after the return of the *subpoena*, an attachment might have been issued against him, no matter how small the debt or demand. This, therefore, alters the practice as stated in Dax's Exch. Prac. p. 16, in Price's Exch. Prac. p. 173, and in Carrington's Edit. of the Rules of that Court, p. 24. n).

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TO THE

PRINCIPAL MATTERS.

Willispi

ACCOUNT STATED.

See INFANT, 4.

1. An administratrix sued for a debt due to the intestate. It appeared that the debt accrued more than six years before the commencement of the action; but that, within six years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could.—Held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the statute of limitations was no bar. *Smith v. Forty*. 126
2. A party may recover the amount of an I. O. U. on a count upon an account stated. *Payne v. Jenkins*. 324
See *Regula Generalis*. 607

ADMINISTRATOR.

See ACCOUNT STATED, 1. LANDLORD AND TENANT, 6.

ADULTERY.

1. In an action for criminal conversation, the plaintiff will be entitled to a verdict, unless he has been in some degree a party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society. *Winter v. Henn*. 494
2. Held, in an action for criminal conversation, that it was not matter of defence, but only in mitigation of damages, that the plaintiff, having married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name. *Calcraft v. The Earl of Harborough*. 499

AGREEMENT.

See GUARANTEE. LANDLORD AND TENANT, 1, 2, 8. STAMP, 2, 3, 4, 6.

1. The plaintiff may recover on proof of work done, on an implied contract, although it

appear in the course of the defendant's case, that there was a written agreement relating to the matter, which cannot be read for the want of a stamp. *Secus*, if the fact come out in the course of the plaintiff's case. *Fidler v. Ray*. 61

2. A party published a prospectus for the publication of a county map and gazetteer, stating that the map would contain "the exact limits of every parish and township in the county." The defendant agreed to take a copy of each. They were published, and there were lines on the map denoting the boundaries of townships, but no distinct lines to show the boundaries of those parishes which consisted of several townships:—Held, that the map was not according to the prospectus, and that the defendant was not bound to take the map, although, by reference to the gazetteer, it could be ascertained what townships were in each parish. *Teesdale v. Anderson*. 198
3. A tradesman holding a situation in a public office, being indebted to several persons, they met together, and signed an agreement, in which they stated, that he, being unable to make immediate payment, they agreed to accept payment by his covenanting and agreeing to pay to a trustee of their nomination, one third of his annual income, and executing a power of attorney as a collateral security. The debtor did not sign the agreement, but attended the meeting, and expressed his willingness to comply with its terms. Before anything had been done in execution of the agreement, one of the creditors, who had signed it, brought an action against the defendant for his original debt:—Held, that he could not recover. *Good v. Cheeseman*. 513

AMENDMENT.

1. The Judge, at the trial, will not allow an amendment under the stat. 9 Geo. 4, c. 14, where there is a variance which would not have occurred if common care had been used in the drawing of the declaration. *Jelf v. Oriel*. 22
2. In a declaration on a bill of exchange, the date of the bill was stated to be the 26th of March; it really was the 29th. The cause was undefended, and the judge allowed the variance to be amended under the stat. 9

Geo. 4, c. 14, without the payment of any costs. *Bentley v. Scott.* 24

APOTHECARY.

See LUNATIC. MASTER AND SERVANT, 1.

1. A. gave a sum of money into the hands of B. to pay to C.; B. had not paid it over to C.—Held, that if C. had not consented to receive this sum of B., A. might countermand the authority, and recover it back from B. *Owen v. Bowen.* 93
2. If A. agrees to serve B. as an apothecary's assistant at such salary as C. should think reasonable, and it appear that no application had been made to C. to fix any salary, A. cannot recover anything for his services in an action for work and labour. *Id.* 110
3. A surgeon and apothecary may, besides his charges for medicine, recover such charges for attendances as the Jury shall consider to be fair and reasonable. *Handey v. Henson.* 110
4. A. had several of his children residing in a house distant from his own, in the charge of B., a servant:—Held, that if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, and although the accident might have arisen from the carelessness of the servant:—Held, also, that if B., the servant, becoming ill in consequence of the service, call in C., a surgeon, and after this A. send his own surgeon, and the wife of A. know of C.'s attendance, and expresses no disapprobation, A. is liable to pay C. for this attendance. *Cooper v. Phillips.* 581
5. A servant who hurt her foot in getting over a gate called in a surgeon, who was not the regular medical attendant of the family, without the knowledge of her master or mistress:—Held, that the master was not liable to pay the surgeon's bill. *Id.*

APPREHENSION.

See TRESPASS, 3.

A. went to a house at night, demanding to see the servant. He was told to depart, and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived, A. said, that if a light appeared at the windows he would break them; upon which the constable took him into custody:—Held, that the constable was not justified in so doing. *Rez v. George Bright.* 387

ARSON.

See BOAT

1. An indictment on the stat. 7 & 8 Geo. 4, c. 30, ss. 2. & 17, for setting fire to a barn and a stock of straw, charged the offences to have been committed "feloniously, voluntarily, and maliciously," instead of "feloniously, unlawfully, and maliciously;" Held bad. *Rez v. Reader.* 245
2. The prisoners had set fire to a stack of stubble (which, in Cambridgeshire, is called haulm); they were indicted on a first indictment, for setting fire to a "stack of straw:"—Held, that this was not straw. And, on their being again indicted, for setting fire to a "stack of straw called haulm," the Judge intimated, that to convict upon

such a count, would not be safe; and the verdict, in consequence, was taken upon other counts, charging the setting fire to a barn and a wheat-stack. *Id.*

3. An indictment, on the stat. 7 & 8 Geo. 4, c. 30, s. 17, charged a party with setting fire to a "stack of barley, of the value of 100*l.* of R. P. W.:"—Held good, although the words of the statute creating the offence are "any stack of corn or grain:"—Held also, that the words "of R. P. W." sufficiently stated the property:—Held also, that if the indictment state that the prisoner, on, &c., at, &c., feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of the value of 100*l.* of R. P. W. then and there being," this is sufficient, without stating that the prisoner, on, &c., at, &c., feloniously, unlawfully, and maliciously did then and there set fire to the stack. *Rez v. Swatkins.* 548

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See MURDER, 1. ROBBERY, 1.

ASSAULT.

See APPREHENSION. PRIZE-FIGHT. SHIPPING, 6. THEATRE, 1. TRESPASS, 3.

1. If parish officers cut off the hair of a pauper in the poor-house, by force, and against the will of such pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages. *Forde v. Skinner.* 239
2. A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have almost immediately reached B., if he had not been stopt:—Held, that it was an assault in point of law, though, at the particular moment when A. was stopt, he was not near enough for his blow to take effect. *Stephens v. Meyers.* 349
3. A police constable is not justified under the stat. 10 Geo. 4, c. 44, s. 7, in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing, is known to be a reputed thief. *Stocken v. Carter.* 477

ASSIGNMENT.

An assignment of property for the purpose of securing debts due and to be due, with a power of sale, upon giving six months' notice, is only a collateral security; and without a special charge to that effect, does not suspend the remedy by action against the debtor. *Emes v. Widdowson.* 151

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See AGREEMENT, 3. LANDLORD AND TENANT, 5.

Trustees under a general assignment for the benefit of creditors, refused to allow one of them to sign the deed, on the ground that they had discovered, after the assignment was agreed on, that his claim was founded on an usurious transaction:—Held, that this refusal remitted him to his original rights. *Garrard v. Woolner.* 471

ATTORNEY.

See **BANKRUPT**, 1. **INSOLVENT**, 7.

1. If, in an action for an attorney's bill, it appear that the plaintiff in his bill charges for specific attendances on particular days; and, besides that, charges a further sum for several attendances—The Judge at the trial will direct the jury to deduct this latter sum from the amount of the bill. *Rowson v. Earle*. 44
2. An attorney may recover the amount of his bill in an action, although the copy delivered under the statutes 2 Geo. 2, c. 23, and 12 Geo. 2, c. 13, contain such abbreviations as—"Declon." "Instrons." "Confce." "Afft." "Atty." &c. *Frowd v. Stillard*. 51
3. A solicitor to a commission of bankrupt may maintain an action for the amount of his bill up to the choice of assignees, without having had his bill taxed by the commissioners, under s. 14 of the bankrupt act, 6 Geo. 4, c. 16, that provision applying only to cases between the assignees and the estate. *Taylor v. M'Gaugen*. 96
4. If an attorney sue out a writ against A., at the suit of B., without any authority, express or implied, from B. for so doing, and A. pay the costs of such writ to the attorney, A. may recover back the amount of those costs, by bringing an action for money had and received against the attorney; but if the attorney had any authority, either express or implied, from B., to sue out the writ, such action for money had and received will not lie against the attorney, even though B. had no cause of action against A. *Dupen v. Keeling*. 102
5. A., an attorney, did business for B., another attorney, in a cause in which B. was a party.—Held, that A. could not recover the amount of his charges, without proof of his having delivered his bill, under the stat. 3 Jac. 1, c. 7.—Held also, that, under such circumstances, A. might recover a sum of money lent on a distinct account, but not for disbursements made in the cause. *Hemming v. Wilton*. 318
6. An agent to a country attorney need not deliver a bill under the stat. 3 Jac. 1, c. 7, s. 1, if the charges be for agency in causes in which the defendant was the attorney and in which the plaintiff acted as his agent. *Sandys v. Hornby*. 520

AWARD.

1. In an action of debt on an award, interest is recoverable on the sum awarded, from the time at which it was demanded. *Johnson v. Durant*. 327
2. An arbitrator cannot be compelled to give evidence in a cause as to matters that occurred before him during the arbitration. *Jb.*

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See *Regulæ Generales*, Nos. 1-5. 601

BANKRUPT.

See **ATTORNEY**, 3. **LIMITATIONS**. **STATUTE** OF, 4.

- 1 Where an attorney is employed by one person to sue out a commission of bankrupt on the petition of another person, the person

so employing the attorney, and not the petitioning creditor, is the person liable to pay the attorney the costs of suing out the commission. *Pocock v. Russell*. 14

2. If an action be brought against the assignees of a bankrupt, and, before the trial, the bankrupt obtains the signature of a sufficient number of creditors to his certificate, and be willing to release his surplus, but his certificate has not been allowed by the Lord Chancellor; the Judge will not put off the trial to give time to obtain the allowance of the certificate by the Lord Chancellor, so as to make the bankrupt a competent witness for the assignees. *Tennant v. Strachan*, 31
3. If bills be paid in at a banker's as short bills (i. e. bills which the bankers are to present when due, and carry the proceeds to account), and after a commission of bankrupt has issued against the bankers, but before the choice of assignees, a person, on behalf of the customer by whom they were paid in, calls at the banking-house to demand a return of these bills, the answer he receives is evidence in an action of trover, brought against the assignees for the recovery of such bills: but if, before the choice of assignees, some of the bills were paid, the customer cannot recover the value of such bills as were so paid, in an action of trover against the assignees. *Jb.*
4. If the assignees, when called on to return the bills, claim a right to retain such as have not been paid, alleging that the bankrupts had discounted them for the customer before the bankruptcy, this is presumptive evidence that these bills were the bills paid in by such customer. *Jb.*
5. If a customer pay into the hands of his banker certain bills, as short bills, and, after the bankruptcy and choice of assignees, the assignees present them for payment, and receive the proceeds, and claim to hold the proceeds against the customer, they are liable in trover. *Jb.*
6. If a person, after notice of an act of bankruptcy, sets up a claim of lien upon certain deeds, and the bankrupt pay the sum he demands to get possession of the deeds, the assignees cannot question the amount of this lien, unless there be a count for money had and received to the use of the assignees; but if the person had really no just claim at all, the assignees may recover back the sum in an action for money had and received to the use of the bankrupt; however, if it appear that the defendant never received any money, but that A., who was to have conveyed a house to the bankrupt, at his desire mortgaged it to the defendant, an action for money had and received will not lie. *Noble v. Kersey*. 90
7. Commissioners of bankrupt committed a witness for refusing to read the entries in an account.—Held, that they were liable to an action for false imprisonment for so doing, because this was not a question:—Held, also, that the circumstance of the witness speaking of it as a question at the time of his refusal made no difference. *Isaac v. Impey*. 113
8. A defendant, in a suit by assignees of a bankrupt, was told, at an interview with the attorney for the assignees (which was arranged by his own attorney, but which he thought proper to attend alone), that his attorney had proposed that he should admit

- every fact, *except the merits*, provided the plaintiffs would waive their right of holding him to bail; and he was asked, whether that proposal was made with his authority. He replied, that it was; and that he was ready to carry it into effect, *as the only question he wished to try was, whether he was liable on the undertaking he had given*:—Held, that this amounted to an admission of the right of the assignees to sue, although no mention was made of it in the conversation. *Semble*, that it would have been otherwise, if, without further explanation, he had only said that he wished to *try upon the merits*. Held, also, that having received advantage from the admission in the waiver of the right to hold to bail, he could not afterwards withdraw it, and insist upon proof of the bankruptcy. *Davies v. Burton*, 166
9. A bankrupt assigned all his property to two trustees, one of whom was the petitioning creditor, who was present at the execution of the assignment by the bankrupt, and executed it himself, but not in the presence of any attorney or solicitor:—Held, that this was not such an assignment, as, being communicated to a creditor of the bankrupt, before the receipt by him of money from the bankrupt, would enable the assignees to recover such money as money received after and with notice of an act of bankruptcy. *Burbridge v. Watson*, 170
10. A bankrupt, who was in prison for debt, did not surrender to his commission, nor did he apply to have the time for his surrender enlarged, nor did he apply to be brought up to surrender under sect. 119 of the bankrupt act, 6 Geo. 4, c. 16, nor did he give notice to the commissioners that he was in prison:—Held, that under these circumstances he was not indictable under s. 112 of the stat. 6 Geo. 4, c. 16, for not surrendering to his commission, even though the imprisonment could be shown to have been collusive. *Res v. Mitchell*, 251
11. If, in an action by the assignees of a bankrupt, notice of disputing the trading, &c., has been given; and it appear that part of the amount claimed could not have been recovered by the bankrupt; the proceedings under the commission are not sufficient proof of the trading, &c., to entitle the assignees to go for their whole claim, and they will, on such evidence, be restricted to that part of their claim which the bankrupt could have recovered. *Gibson v. Oldfield*, 313
12. If a trader buy goods and sell them again on the same day at more than thirty per cent. less than he bought them for, this may be an act of bankruptcy under sect. 3 of the bankrupt act; but, to make it an act of bankruptcy, the Jury must be satisfied that the person to whom the trader sold the goods must have been led to suppose that the trader was a person going to become bankrupt, who wished to get money into his hands to cheat his creditors. *Cook v. Caldecot*, 315
13. In an action by the assignees of a bankrupt for a debt due to the bankrupt; the defendant may plead a tender as to part, and give evidence of a set-off as to the remainder, without having pleaded the set-off. *Wells v. Crofts*, 332
14. If a bankrupt, before his bankruptcy, let a person have goods, telling him to keep them till he (the bankrupt) wants them back, and no demand be made of them till after the bankruptcy:—Held, that if, in an action of detinue by the assignees, notice is given of disputing the bankruptcy, the proceedings are evidence of the trading, &c., under sect. 92 of the bankrupt act. *Smith v. Woodward*, 541
15. Form of justification by commissioners of bankrupt, who had committed a witness. 114, a.
- BARGE.**
See BOAT, 2.
- BIGAMY.**
In an indictment for bigamy, the second wife was described as "E. C., widow." She was in fact not a widow, nor had she ever been represented or reputed to be so.—Held, a fatal variance. *Res v. Deeley*, 579
- BILL OF EXCHANGE AND PROMISSORY NOTE.**
See AMENDMENT, 1, 2. INSOLVENT, 1, 3, 6.
8. LIMITATIONS, STATUTE OF, 1, 2. PARTNERS, 1.
1. A foreign bill of exchange was drawn by A. upon C. & Co., who resided at Liverpool, in favour of L. R. & Co., and by A. endorsed to the plaintiffs. The bill was drawn, "Sixty days after sight, pay to L. R. & Co. in London," &c. It was refused acceptance by the drawee, but accepted under protest for honour of the drawer by the defendants as follows:—"Accepted under protest for honour of L. R. & Co., and will be paid for their account if regularly protested and refused when due." This bill was presented for payment at the residence of the drawees in Liverpool, and protested at Liverpool for non-payment; but it was not presented for payment, or protested, in London, where the drawees had not any house of business:—Held, that the holders were entitled to recover against the acceptors for honour; and that, under these circumstances, a presentment in London and protest there were not necessary. *Mitchell v. Baring*, 35
2. If A. authorize B. to draw bills upon him, and B. do so, A. is not liable to be sued as the drawer of those bills. Therefore, where, by a resolution of the directors of a mining company, four directors were necessary for the doing of any act; and three of the directors were called trustees, and those three gave a power of attorney to the agent of the company to draw bills:—Held, that the other directors were not liable on those bills, as the power of attorney was not executed by four directors. *Ducarry v. Gill*, 121
3. The plaintiff had accepted a bill for 148*l.* for the accommodation of T., who gave it to N. for a particular purpose; N. borrowed 10*l.* of the defendant, and gave him this bill as a security. This sum of 10*l.* was repaid by N., but the bill was not given up and the defendant endorsed it for value to R., who, when it was dishonoured, caused both the plaintiff and T. to be arrested, and the plaintiff paid the amount of the bill, and the costs of both arrests:—Held, that the plaintiff was entitled to recover the amount of the bill from the defendant, but not the costs of the two arrests. *Roach v. Thompson*, 194
4. A banker in London, corresponding with a banker abroad, has the same right, with re-

- spect to English bills of his correspondent becoming due while in his hands, as an English banker has with respect to his customer in England; and therefore, if such a bill be dishonoured, he may send it, when returned, to his correspondent abroad; but *semble*, that if the foreign correspondent be afterwards in London, in possession of the bill, he ought not to send it again to the London banker, but should himself give notice of dishonour to the party who endorsed it to him. *Daly v. Slatter*. 200
5. The declaration in an action on a bill of exchange stated it to have been drawn by one Hannah P., accepted by the defendant, and endorsed by the said Hannah P. to the plaintiffs. The drawing and endorsement appeared to be in this form:—*Per pro*. H. P., John P. A clerk of the plaintiffs proved that the drawing and endorsement were of the handwriting of a Mr. John P., whom he *understood* to be the son of a Mrs. P., whom he had *never seen*, but with whose house the house of his employers had dealings, and that he had seen bills drawn and accepted in the same form as the bill in question, some of which bills had been paid. The plaintiffs, on this evidence, had a verdict; and a rule *nisi* for a new trial having been obtained, an affidavit, in consequence of an observation made by the Lord Chief Justice, was produced, stating the name of the party to be Hannah P., and that the bill was drawn by her authority. And the Court of King's Bench, on the whole evidence, *refused* to make the rule for a new trial absolute. *Jones v. Turnour*. 204
6. In an action by the endorsee against the acceptor of a bill of exchange, the witness called to prove the handwriting of the drawer stated, that neither the drawing nor the endorsement were of the handwriting of the person whose they purported to be. It was proved that the defendant had acknowledged the acceptance to be his, and it was contended, that, as the acceptance admitted the drawing to be correct, the Jury might find for the plaintiff, if they thought, upon inspection of the bill, that the drawing and endorsement were of the same handwriting; but it was held to be necessary, that some proof should be given as to whose the handwriting was. *Allport v. Meek*. 267
7. Where two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk, in this form: "For agents of the R. V. B.—J. G." It was held to be no answer to a joint action against them by the endorsee of such a bill, to show, that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the endorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact. *Sanderson v. Brooksbank*. 286
8. When a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the Jury are satisfied that such person, knowing the facts, and being aware of his rights, had consented to waive his objection. *Leaf v. Gibbs*. 466
9. In an action by the endorsee against the ac-

- ceptor of a bill of exchange, it is no objection to the plaintiff's right of recovery, that the acceptance actually took place before the drawer's name was signed; although the declaration be in the usual form, *viz.* that the bill being drawn, the defendant *afterwards* accepted, and that the transaction was according to the custom of merchants. And it is not necessary that the plaintiff, in such action, should offer any evidence to show that it is the custom of merchants so to transact business. *Molloy v. Delves*. 492
10. In an action on a bill of exchange, where the declaration alleges, that notice of dishonour was given to the defendant, it will satisfy the allegation to show that notice was given before action brought, although, from the party's not being to be found, it was not given at the proper time.—But *semble*, that such an allegation is not satisfied by proof of the use of due diligence in endeavouring to find the party, when no notice has been given at all. *Harris v. Richardson*. 522
11. The endorsement by a married woman, *with her husband's assent*, of a bill of exchange drawn by her, is binding upon him, and will pass the interest in the bill to the endorsee so as to enable him to sue the acceptor. *Prestwich v. Marshall*. 594
12. Form of declaration on an acceptance for honour. 35, n.
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BOAT.

1. An indictment on the statute 7 & 8 Geo. 4, c. 30, s. 10, for damaging a vessel, need not state the damage was done "otherwise than by fire," if it state how it was done. *Rez v. Bowyer*. 559
2. Whether a small pleasure boat, 18 feet long, is a vessel within the meaning of that statute—*quare*. *Semble*, that it is. *Ib.*
3. An indictment for setting fire to a barge, the property of another, ought to contain an averment that it was done with intent to prejudice the owner, &c. *Rez v. Smith*. 569
4. Whether a barge is a vessel within the stat. 7 & 8 Geo. 4, c. 30, s. 9—*quare*. *Ib.*

BOND.

See SHIPPING, 3.

BURGLARY.

The lifting up of a trap-door covering a cellar, which was merely kept in its place by its own weight, and which had no fastenings, because, it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary; but unlocking and opening a hall-door and running away, is a sufficient breaking out of the house. *Rez v. Lawrence*. 231

BURNING.

See ARSON.

CATTLE.

See POISONING CATTLE.

CERTIORARI.

See COSTS. PRACTICE, 7.

CHARTER-PARTY.

See SHIPPING.

COAL.

Where the vendor of coals himself inserts in the vender's ticket the description of them, it is not necessary, in an action for penalties under the 47 Geo. 3, c. lxviii., to produce the ship-meter's certificate, required by the 55th section of that statute. *Reeve qui tam v. Starey.* 17

COMMITMENT.

1. On charges of felony, a magistrate has a power to commit for re-examination for a reasonable time. What is a reasonable time, will greatly depend upon the circumstances of each case—fifteen days is an unreasonable time, unless there be circumstances to account for it, and those circumstances it will be incumbent on the magistrate to show. *Davis v. Capper.* 134

2. The fact, that a letter addressed to the prisoner (but which was intercepted, and never was in the hands of the prisoner), mentioned the prisoner as a *particeps* in the felony, and stated, that the writer of it would write again in a fortnight, is not sufficient to warrant such a commitment. *Ib.*

3. The question of reasonable time is a mixed question of law and fact. It will be for the Jury to say what the facts are, but the Judge will direct them upon those facts, whether the time was reasonable or not, as matter of law. *Ib.*

4. If a magistrate commits a party till a certain day for re-examination, it is his bounden duty to be in attendance on that day, to take the further examination, and to discharge the party, if there be not evidence sufficient to warrant a further commitment. If a party is committed for further examination for an unreasonable time, his remedy is by action of trespass against the committing magistrate. *Ib.*

5. If a magistrate commits a prisoner for fifteen days, for further examination, to make the prisoner tell who wrote a letter which was addressed to the prisoner, but which was intercepted, and never was in the hands of the prisoner, such commitment will be illegal. *Ib.*

COMPOUNDING FELONY.

If, in an indictment for compounding felony, it be averred that the defendant did desist, and from that time hitherto hath desisted from all further prosecution; and it appear, that after the alleged compounding, he prosecuted the offender to conviction, the Judge will direct an acquittal. *Res v. Stone.* 379

CONCEALMENT OF BIRTH.

A woman was delivered of a child, whose dead body was found at her father's house in a bed among the feathers. There was no evidence to show who placed it there, but it being proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes—the learned Judge directed an acquittal on the charge of endeavouring to conceal the birth. *Res v. Higley.* 366

CONDITION PRECEDENT.

1. Where it was part of a condition precedent to the claim of a sum of 80*l.*, in addition to the purchase-money for a new house, that

the pavement in front of the adjoining houses should be laid down by the 21st of April; it was held that the delay of four days, though occasioned by *bad weather*, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. *Maryon v. Carter.* 295

2. A. and B. were litigant parties in several actions, C. was the attorney of B.; and at a meeting to settle the actions, it was agreed between A. and B., in the presence of C., *inter alia*, that C. should give his promissory note at two months as a collateral security for the payment by B. to A. of a sum of 450*l.* And it was added that all the effects which A. had of B.'s should be delivered up to C. as B.'s attorney. C. signed the note at the meeting immediately after the signing of the agreement:—Held, in an action on the note by A. against C., that the delivery up of the effects was not a condition precedent to the right of A. to claim the money. *Irving v. King.* 309

CONFESSION.

See EVIDENCE, 3, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 18, 19, 20, 21. *FORGERY*, 3.

CONSPIRACY.

Semble, that an indictment, charging the defendants with conspiring "to cheat and defraud the just and lawful creditors of W. F." (without any further statement of the conspiracy, or of any overt act), is bad as being too general. *Res v. Fowle.* 592

CORONER.

It is the duty of a coroner in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death. *Res v. Quinch.* 571

CORPORATION.

If the mayor of a town order weights and measures, and, when supplied, they be examined at a full meeting of the corporation—This is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact, that the mayor was afterwards ousted from his office by a judgment of the Court of King's Bench makes no difference. *De Grave v. The Mayor and Corporation of Monmouth.* 111

COSTS.

See BILL OF EXCHANGE, 3. *PRACTICE*, 4.

If a prosecutor, having removed an indictment by *certiorari*, give notice of trial for the Assizes, and bring down the record, and withdraw it after it has been entered for trial, the Judge at the Assizes cannot order the prosecutor to pay the defendant the costs of the day; but a motion must be made in the Court of King's Bench. *Res v. Watton.* 229
See Regula Generalis, No. 12. 601, 627

COVENANT.

See STAMP, 5.

DECLARATION.

Forms of, 8, 35, 87
See Regula Generales, Nos. 6, 7, 8, 10, 14.
 601, 607

DECLARATION IN ARTICULO
 MORTIS.

See MURDER, 1. ROBBERY, 1.

DEED.

See STAMP, 4, 5.

DEMURRAGE.

See SHIPPING, 1.

DETINUE.

See BANKRUPT, 14.

DISTRESS.

See LANDLORD AND TENANT, 3.

DOG.

See TRESPASS.

The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off:—Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in protection of his property. *Wells v. Head.* 568

EASEMENT.

See JUDGMENT RECOVERED, 1.

EJECTMENT.

See LANDLORD AND TENANT. WITNESS, 8.

1. If a lessor of the plaintiff is nonsuited for want of the defendant's confessing lease, entry, and ouster, the Judge will not grant a certificate under the stat. 1 W. 4, c. 70, s. 30, to give the lessor of the plaintiff immediate possession, unless an affidavit stating the circumstances of the case be laid before him. *Doe d. Williamson v. Dawson.* 589
2. Under that stat. the Judge has no discretion as to the time at which the lessor of the plaintiff shall have possession, as he must either grant a certificate to enable him to get immediate possession, or let the case take its regular course. *Ib.* 604
See Regula Generalis.

ELECTION.

If A. agree to reinvest a sum in the 3l. per cent. consols in the name of B., charging the stock at a price not exceeding 68½ per cent., or to repay the sum in bank notes on B. giving A. six months' notice, it is in the election of B., whether he will have the money reinvested, or paid in bank notes. In general, the election is in the party who is to do the first act. *Chippendale v. Thurston.* 98

EMBEZZLEMENT.

1. A. was employed to lead a stallion, and he was to charge 30s. a mœ., and not take less than 20s. He received a sum of 6s. for the covering of a mare, which he did not account for:—Held, no embezzlement, as the sum was not received by virtue of his employment. *Rex v. Snowley.* 390

2. The halves of country bank notes, sent in a letter, are goods and chattels; and a person who steals or embezzles them is indictable for such larceny or embezzlement. *Rex v. Mead.* 535

EMBEZZLEMENT BY AGENTS.

1. A. placed valuable securities in the hands of B., with a written direction to invest the proceeds in the funds, "in case of any unexpected accident happening to A." No accident did happen to A., and the proceeds were by B. converted to his own use:—Held, that B. was not indictable under the stat. 52 Geo. 3, c. 63 (now repealed); and it seems that he would not be so under the stat. 7 & 8 Geo. 4, c. 29, s. 49. *Rex v. White.* 46
2. An allegation in an indictment, that A. placed valuable securities in the hands of B., "with an order in writing to invest the proceeds in the government funds," is not supported by proof of an order in writing, directing B. to invest the proceeds in the government funds, in case of any unexpected accident happening to A. *Ib.*
3. Form of indictment. *Ib.*

EVIDENCE.

See BANKRUPT, 3, 8, 11, 14. BILL OF EXCHANGE, 6, 9. EMBEZZLEMENT BY AGENTS, 2. FORGERY. INSOLVENT, 4, 9. INSURANCE. LANDLORD AND TENANT, 4. LIBEL, 1, 2, 3, 5. LIMITATIONS, STATUTE OF, 3. MALICIOUS ARREST. MANSLAUGHTER, 2. NEGLIGENCE, 4, 6, 8, 9, 11. POISONING CATTLE, 1. RAPE, 1. RECEIVING STOLEN PROPERTY, 2. ROBBERY, 1, 2.

1. If a witness, called for the plaintiff, in his cross-examination admit that a letter was written by him with the authority of the plaintiff, but deny that a second letter is of his handwriting; the defendant's counsel will not be allowed to show both letters to another witness, called for the plaintiff, and ask him whether he does not believe that the second letter was written by the same person who wrote the first. *Clermont v. Tullidge.* 1
2. If a parish register of baptisms state that the person baptized was born on a particular day, that is not evidence of the date of his birth. *Rex v. Clapham.* 29
3. If a witness give evidence of a conversation with a prisoner, in which that prisoner says something implicating another prisoner, the witness, in giving his evidence, must not omit the name of such other prisoner and say "another person," but must give the conversation exactly as it occurred, and the Judge will tell the Jury that it is not evidence against such other prisoner. *Rex v. Hearne.* 215
4. A. was indicted for the murder of H. It was opened that A., having malice against P., hired H. to murder him, and that H. did so, but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P.; and it was held that the prosecutor might also give evidence to show that H. was, in fact, the person by whom P. had been murdered. *Rex v. Clewes.* 221
5. A person charged with murder made a confession before the Coroner. It appeared that, before he made this confession, B., who was

- both a clergyman and a magistrate, had had an interview with him:—Held, that the prosecutors were not bound to call B. before they put in the confession, but that it would be fair for them to do so; and that if the prosecutors did not call B., the prisoner might call him before the confession was read, to prove that some inducement was held out. *Ib.*
8. A., a prisoner charged with murder, was visited by B., who was both a magistrate and a clergyman; B. told him, that if he was not the person who struck the fatal blow, and he would tell all he knew, he (B.) would use his endeavours and influence to prevent anything from happening to him; and that if he (A.) did not make a disclosure, some one else would probably do so. After this B. wrote to the Secretary of State, who returned an answer that mercy could not be extended to A.; which answer was communicated by B. to A. After this, A. sent for the Coroner, and wished to make a statement. The Coroner told him that if he did so, it would be used as evidence against him. The prisoner made a confession.—Held, that this confession was admissible. *Ib.*
9. If a prisoner, in a confession made before a Coroner, which is taken down in writing, mention the names of two other persons who are also charged with the same offence, the confession, when read in evidence, must be read with these names in it, just as it is, and the officer of the Court must not say "another person," and "a third person," instead of reading the names. *Ib.*
8. If a prisoner, charged with murder, say in his confession, which is read in evidence against him, that he was present at the murder, but took no part in the commission of it, this is evidence for him as well as against him; but the Judge will not direct an acquittal, as the Jury may believe one part of the confession and disbelieve another; however, if it is meant to be charged that the prisoner did more than is stated in the confession, there ought to be some evidence to show that. *Ib.*
9. A prisoner being under examination before a magistrate, on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which, the witness called to prove it said, he *believed* had been taken down in writing:—Held, that under these circumstances parol evidence of the statement was not admissible on the trial of such prisoner. *Res v. Hollingshead.* 242
10. If a letter, written by one of several prisoners, be read in evidence, and in this letter the names of the other prisoners be mentioned, these names must not be omitted in the reading of the letter, but the Judge will tell the Jury to pay no attention to the letter, except so far as it affects the writer. *Res v. Fletcher.* 250
11. It is to be presumed, that what is stated *on oath* before a magistrate, is taken down in writing, and, therefore, parol evidence of such a statement is not receivable, unless it be first shown that it was not so taken down. *Phillips v. Wimburn.* 273
12. In an action to recover back money paid by a banker on a check, and afterwards allowed to his customer, on a suggestion that the check had been forged; the question in such action being, whether the check in fact was a genuine instrument or not?—the notes of the magistrate's clerk, of statements made by the customer on a charge against the person supposed to have forged the check, are receivable in evidence, though his deposition was afterwards regularly signed pursuant to the statute. *Williams v. Woodward.* 346
13. If a prosecutor give in evidence a declaration made by a prisoner exculpatory of himself, the Jury are not bound to take this to be true, merely because the prosecutor gives it in evidence, but they ought to consider how far it is consistent with the rest of the evidence, and whether they believe it to be really true. *Res v. Steptoe.* 397
14. In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives; a register of burials of a Wesleyan chapel is not admissible to prove the death of one of the *cestuis que vie*; nor is the evidence of a witness who heard in the family that another of the *cestuis que vie* was dead. *Seem*, that a copy of an inscription on a tomb-stone in the burial-ground of a Wesleyan chapel is also not evidence for this purpose. *Whitlock v. Waters.* 375
15. A girl was charged with administering poison, with intent to murder. The surgeon said to her, "you are under suspicion of this, and you had better tell all you know." After this she made a statement to the surgeon:—Held, that that statement was not admissible in evidence. *Res v. Kingston.* 387
16. Any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to *that person*, although that person was not in any authority, as prosecutor, constable, or the like. *Res v. Dunn.* 543
17. A prisoner was indicted for night poaching, and it was proposed to show that, on the occasion in question, one of the prosecutor's game-keepers had lost his coat, and that it was found in the prisoner's house. There was another indictment against the prisoner for stealing the coat:—Held, that this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny. *Res v. Westwood.* 547
18. A prisoner was in the custody of A., a constable; B., another constable, coming into the room, A. left it, and the prisoner immediately made a confession to B.:—Held, that if the prisoner was in custody as an accused party, that A. must be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to B. is receivable in evidence; but if it appear that the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it will not be necessary to call A. If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the Court. *Res v. Swatkins.* 548
19. A prisoner, when before the committing magistrate, was sworn by mistake, he being supposed to be a witness: as soon as the mistake was discovered, the deposition which was begun was destroyed and the prisoner cautioned. After this he made a statement:

—Held, that such statement was receivable in evidence. *Res v. Webb.* 564

20. If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, and he should then be asked, if he has anything to say in answer to the charge. *Res v. Fagg.* 566

21. The captain of a vessel said to one of his sailors suspected of having stolen a watch—"That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle—You are a damned villain, and the gallows is painted in your face."—Held, that a confession made by the sailor after this threat was not receivable in evidence on his trial for the felony. *Res v. Parratt.* 570

22. If, in an action for work and labour, surveyors be called for the defendant, to prove that, in the year 1831, they surveyed the work, and that, in their judgment, the charges were 100*l.* too much:—Held, that a letter from the defendant's attorney, stating that the work had been surveyed in 1829, and that the charges were considered to be 60*l.* too much, is not admissible as evidence in reply. *Knapp v. Haskall.* 590

EXECUTION.

See LANDLORD AND TENANT, 9, 10.

EXECUTOR.

See LANDLORD AND TENANT, 6. PROBATE DUTY.

EXTORTION.

A collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty. A. denied that he had done so, and gave the collector a promissory note for 5*l.*, the amount of which, after it became due, was paid by A. to the collector, who handed it over to his principal the farmer of the post-horse duties:—Held, that this was extortion in the collector, and that his having paid the money over to his principal made no difference. *Res v. Higgins.* 247

FALSE IMPRISONMENT.

See APPREHENSION. THEATRE, 1. TRESPASS, 3.

FELONY.

If a child more than seven and under fourteen years of age, is indicted for felony, it will be left to the Jury to say whether the offence was committed by the prisoner, and if so, whether, at the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. *Res v. Owen.* 236

FIXTURES, STEALING.

Semble, that the stealing of brass fixed to tombstones in a church-yard, is a felony under the stat. 7 & 8 Geo. 4, c. 29, s. 44. *Res v. Brick.* 377

FORFEITURE.

See LANDLORD AND TENANT.

FORGERY.

1. On an indictment for uttering a forged deed, it appeared that the deed alleged to have been forged was produced in evidence by the prisoner's attorney on the trial of an ejectment, in which the prisoner was lessor of the plaintiff; and that, after the trial, it was returned to the prisoner's attorney.—Held, that if the prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling his attorney to prove what he had done with the deed. *Res v. Hunter.* 128

2. If, as secondary evidence of the contents of the deed, the draft be given in evidence, and in the draft words be abbreviated, which, in the setting out of the deed in the indictment, are put in words at length, it will be for the Jury to say, whether they think that the words abbreviated in the draft were inserted at length in the deed itself. *Id.*

3. If a forged deed be in the possession of a prisoner, who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the Assizes, given the prisoner notice to produce it; and a notice given to the prisoner during the Assizes is too late; but if the prisoner has said that he has destroyed the deed, no notice to produce it will be necessary. *Res v. Haworth.* 254

4. A. was charged with forgery, and B. was examined on oath before the magistrate as a witness against A.; after this, B. was himself charged with a different forgery:—Held, that the deposition of B. was evidence against him on his trial for the forgery, notwithstanding that it was taken on oath. *Id.*

5. *Semble*, that on an indictment for uttering a bill of exchange with a forged acceptance knowing the acceptance to be forged, other forged bills of exchange *precisely similar*, passed to the prosecutor by the prisoner, may be given in evidence to show a guilty knowledge in the prisoner, though they were not passed till about a month after the uttering for which the prisoner is tried. *Res v. Smith.* 411

GOODS, COUNTS FOR.

See *Regula Generalis.*

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GUARANTEE.

See ASSIGNMENT.

1. An agreement in the following form:—"I bind myself to be security to you, for J. C., late in the employ of J. P. of L. W., for whatever you may intrust him with, while in your employ, to the amount of 50*l.*" contains a sufficient consideration on the face of it. *Newbery v. Armstrong.* 59

2. A. signed a guarantee on the 18th November, by which he agreed to be answerable to B. for the amount of five sacks of flour, to be delivered to C., payable in one month. On the 19th, B. delivered five sacks to C. On the 21st, he delivered five sacks more. On the 24th, 3 sacks, 4 bushels, and 18 lbs., part of the first five sacks, were returned as of improper quality, and an equal quantity of different flour was sent in:—Held, that A. was not answerable on his guarantee for any more than that part of the first five sacks which was retained. *Kay v. Groves.* 72

HABEAS CORPUS.

See LIBEL, 8.

HUSBAND AND WIFE.

See BILL OF EXCHANGE, 11.

INDICTMENT.

See ARSON. BIGAMY. COMPOUNDING FELONY. CONSPIRACY. COSTS. EMBEZZLEMENT BY AGENTS, 2. MURDER ABROAD, 2. POISONING. POISONING CATTLE, 2. PRACTICE, 7. RIOT, 2, 4. SHEEP-STEALING. THREATENING LETTER, 2.

If a parish be partly situate in the county of W. and partly in the county of S., it is sufficient, in an indictment for larceny, to state the offence to have been committed "at the parish of H. in the county of W." *Res v. Perkins.* 363

INFANT.

1. If a tradesman trust an infant, he does it at his peril, and he cannot recover if it turns out that the party has been properly supplied by his friends. *Story v. Pery.* 526
2. A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles not necessary for her:—Held, that these advances formed no defence to an action for her wages. *Hedgley v. Holt.* 104
3. Payments made to an infant, on account of wages due to her, for her to purchase necessities, are valid payments. *Ib.*
4. Money paid by a master for coach-fares for the mother of his servant, cannot be deducted from the wages of the servant, if the servant be under age. *Ib.*
5. The statement of an account by an infant is not binding on the infant. *Ib.*

INSOLVENT.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 1.

1. Action by the endorsee against the acceptor of a bill of exchange; the defendant had taken the benefit of the Insolvent Debtors' Act, and had set down the drawer as a creditor, in his schedule:—Held, that the drawer was, notwithstanding this, a competent witness for the plaintiff in this action. *Cropley v. Corner.* 21
2. An insolvent debtor is not a competent witness for the plaintiff, in an action brought by his assignee, because his future property is liable to the payment of the debts in his schedule, and therefore he is interested in procuring the recovery of as much money as possible. *DeLafield v. Freeman.* 67
3. To justify the Jury in giving a verdict for the plaintiff, in an action against an insolvent debtor by the endorsee of a bill of exchange, accepted by such debtor, as a security for a debt due to the endorser, and from which he had been discharged under the Insolvent Debtors' Act, they must be satisfied, not only that the plaintiff gave value for the bill, at that he took it, *bond fide*, for his own purposes, without any concert with the endorser, and without any knowledge of the defect in the endorser's title. *Northam v. Latouche.* 140
4. The provision in the 76th section of the 7 Geo. 4, c. 57, that a certified copy of the

petition, schedule, order of adjudication, &c., "shall, at all times, be admitted in all Courts whatever, as sufficient evidence of the same" does not take away the right of producing in evidence the original order of adjudication procured from the Court. *Ib.*

5. Where a defendant pleads that he was "duly discharged" under the Insolvent Debtors' Act, and the plaintiff in his replication denies the discharge *modo et forma*, it is sufficient for the defendant to prove the order of adjudication for his discharge, and it is not necessary to prove the fact of his having filed his petition, although that fact is essential to give the Court jurisdiction. *Andrews v. Pledger.* 374

6. Where, in an action by the payee against one of the makers of a joint and several promissory note, to which the defendant pleads his discharge under the Insolvent Debtors' Act, it appears that no notice of the defendant's intention to apply for his discharge was given to the plaintiff, but that the note was drawn by the other maker, and signed by the defendant for his accommodation; it will be for the Jury to say, whether the defendant knew to whom the note was made payable, for if he did, notice would be necessary, otherwise not. *Sharpe v. Gye.* 311

7. A. being in insolvent circumstances, and wishing to compound with his creditors, had two actions brought against him. A. applied to B., an attorney, to defend them, which B. refused, unless he was paid 20*l.* in hand. The money was paid to B., who defended the actions, the costs being more than 20*l.*; after this A. took the benefit of the insolvent act:—Held, that the 20*l.* could not be recovered by the assignees from B., as it was not a voluntary payment. *Troup v. Brooks.* 330

8. A., an insolvent debtor, in his schedule, stated that he had given his acceptance to B., who was the drawer of a bill, but A. did not mention the name of the endorsee in his schedule:—Held, that if he did not know the bill to have been endorsed, this would be a bar to an action by the endorsee; but that if the insolvent had been told that the bill was in the hands of the endorsee, the insolvent would be still liable, although the Jury might think he had forgotten what he had been told, and that his attorney had made inquiries as to who held the bill, with a view of putting such holder's name into the insolvent's schedule. *Lewis v. Mason.* 322

9. *Semble*, that certified copies of the schedule, &c., under the Insolvent Debtors' Act, are only evidence for the insolvent, and for his creditors, because they are the only persons entitled by the act to claim them. To make the contents of a schedule evidence against an insolvent debtor, *semble*, that some evidence of identity is necessary, and it will not be sufficient that the schedule purports to be the schedule of a person of the name of the insolvent. *Nicholls v. Downes.* 330
10. Form of pleading discharge under the insolvent act. 140

INSURANCE.

See SHIPPING, 4.

If a policy of insurance be produced by the agent of the plaintiff, through whom it was

effected, and the defendant's name be struck out, and have written against it, "adjusted the general and particular averages at 30*l*. 9*s*. per cent.;" this is proof that the policy has been adjusted, but not that it has been satisfied: but the plaintiff will not be allowed to go into evidence to show that some of the sums allowed at the time of the adjustment were too small. If the plaintiff could show that the loss was settled without his authority, or perhaps if he could show that some sum was entirely omitted, he might go beyond the amount of the adjustment. *Adams v. Saunders*. 25

INTEREST.

See AWARD, 1.

If a party show, in an action for money lent, that it was the course of dealing between him and the defendant, to calculate the interest every year, and add that to the principal, and the next year to calculate upon the total, he may recover interest, calculated in the same way, for the years subsequent to the striking of the last balance between the parties. *Newell v. Jones*. 124

I. O. U.

See ACCOUNT STATED, 2.

ISSUE.

See PRACTICE, 6.

JOINT STOCK COMPANY.

See BILL OF EXCHANGE, 2.

JUDGMENT RECOVERED.

A reversioner recovered in an action for obstructing an ancient light, to the injury of his reversionary interest. The obstruction was not removed:—Held, that he might maintain a second action for the continuance of the injury to his reversionary interest, and that, on issue taken whether this was the "same identical grievance" for which he had previously recovered, the reversioner was entitled to a verdict. *Shadwell v. Hutchinson*. 333

JURY.

See PRACTICE, 5.

LANDLORD AND TENANT.

See STAMP, 5.

1. If, by a written agreement, A. agrees to let, and B. to take a messuage from a day past, for a term of ten years, "at and under the rent of 80*l*." This is an agreement by B. to pay a rent of 80*l*.; and therefore if there be a power of re-entry in case of a breach of "any of the agreements therein contained," A. has a power of re-entry for non-payment of rent, although there is no express agreement to pay the rent. *Doe d. Rains v. Kneller*. 3
2. Where the agreement under which a party holds a house states, that he "agrees to become tenant by occupying," it will be an answer to a claim of rent, in an action for use and occupation, if he shows that the house was not in such a reasonable and de-

cent state of repair, as to be fit for comfortable occupation. *Salisbury v. Marshal*. 65

3. A. gave B. authority to distrain on the goods of C., and gave him an indemnity against all costs and charges that he might be at "on that account." B. made the distress, and his men being told by the son of C. that a certain cask contained spent liquor of no value, they took the cask to pieces, and let the liquor run off. It was, in fact, cochineal dye, belonging to D. For the wasting of it D. recovered damages against B. in an action of trover. Held, that B. could not recover the amount of those damages from A. in an action on the indemnity; and that such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress. *Draper v. Thompson*. 84
4. In an action of ejectment by the reversioner (on the expiration of a building lease), to recover possession of a house, which adjoined one that the lessor of the plaintiff had sold to the defendant, and the description of which, in the surrender (it being copyhold), contained the words "as now occupied by A. B., or his under-tenants;" an under-lease (granted pending the existence of the original building-lease) under which A. B. claimed the ground upon which both the houses were built, was received as evidence of the mode in which the property had been enjoyed. *Doe d. Tims v. Jordan*. 146
5. Trustees under an assignment for the benefit of creditors, are entitled (like assignees under the Bankrupt and Insolvent Debtors' Acts), to a reasonable time to ascertain whether property held under a lease by the debtor, can be made available for the benefit of the creditors or not; but if they act in such a way as to render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will, by that conduct, make themselves personally liable for the payment of rent and performance of covenants. *Carter v. Warne*. 191
6. A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession:—Held, that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant; and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix. *Rees d. Mears v. Perrott*. 230
7. A. applied to B. (the proprietor of a house, with cellars, which he was in the habit of letting), telling him that he wanted cellar room to do a *pipe* of wine, but adding, that he did not know but very shortly he might want a good deal of room; B., upon this, said that he had better put it into his (B.'s) own cellar; which he did:—Held, that under these circumstances, B. was entitled to detain the wine, till a *reasonable and proper* sum had been paid him for rent. *Gray v. Chamberlain*. 260
8. An agreement, by which A. agrees to "let" premises to B., "on lease" for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease, under which he holds," and "to keep the said stipulations in every respect until the said lease shall be granted, which lease, when required by B., is to be prepared by"

A.'s solicitor, but at B.'s expense—is a lease, and not only an agreement for one. *Wilson v. Chisholm.* 474

9. In an action by a landlord against a sheriff, for removing, under an execution, the goods of his tenant, without securing the payment of a year's rent, as required by the statute 8 Anne, c. 14, the tenant was called to prove the rent due, and objected to as interested, and released by the landlord:—Held, that this release could not be pleaded in bar of the action *pais darrein continuance*, nor did it reduce the landlord to the necessity of taking a verdict against the sheriff for nominal damages only. *Thurgood v. Richardson.* 481

The statute 8 Anne, c. 14, s. 1, applies to goods in apartments being parcel of a messuage. *Ib.*

LARCENY.

See EMBEZZLEMENT, 2. FELONY. INDICTMENT, 1. POST OFFICE.

1. If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, and a party come in the night and steal them out of these boxes, this is a larceny. *Rex v. Brooks.* 131
2. A. delivered his watch to B. to be repaired. Instead of repairing it, he sold it; and A., being informed of this, told B. that he would either have his watch back or the money:—Held, no felony. *Rex v. Levy.* 241
3. A prisoner was indicted for stealing three articles. It appeared, that, having taken the first article, he returned in about two minutes and took the second, and then returned in half an hour and took the third:—Held, that the last taking was a distinct felony, and could not be given in evidence with the other two. But, that the interval of time between the first and second takings was so short, that they must be considered as parts of the same transaction. *Rex v. Birdseye.* 386
4. A box belonging to a Benefit Society was stolen from a room in a public-house. Two of the stewards had keys of this box; and, by the rules of the society, the landlord ought to have had a key, but in fact he had not:—Held, that the prisoner might be convicted on a count laying the property in the landlord alone. *Rex v. Wymer.* 391
5. If one employed to carry goods for hire, appropriate them to his own use, but does not break bulk, this is no larceny, although the person so employed were not a common carrier, but was only employed in this particular instance. *Rex v. Fletcher.* 545

LARCENY IN A DWELLING-HOUSE.

If a prisoner, who was in the service of the prosecutor, steal a quantity of lace in several pieces, the pieces together being above 5*l.* in value, and bring them all out of his master's house at the same time, this is a capital offence, although it be shown that the prisoner had the opportunity of stealing the lace by a piece at a time, and that no one of the pieces was worth 5*l.* *Rex v. Jones.* 217

LEASE.

See LANDLORD AND TENANT, 7.

LETTER.

See LIBEL, 5, 7. POST OFFICE.

LIBEL.

1. If a libel, purporting to be a circular, written by the secretary of a society for the protection of trade against swindlers, impute certain specific facts to the plaintiff; a witness cannot be asked what he understands by finding a person's name inserted in such a circular; but he may be asked whether there is any meaning in such a circular, beyond what appears on the face of it. *Humphreys v. Miller.* 7
2. If the members of such a society agree to contribute towards all law expenses respecting it, and an action be brought against the secretary of it for a libel, it seems that a member of the society is a competent witness for the defence, because an agreement by parties, that they will bear each other harmless in doing wrong, is void. In this case a member of the society was examined for the defence, but the secretary released him before he gave his evidence. *Ib.*
3. The declaration, in an action for libel, averred that the plaintiff carried on the business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward of a certain company or society of persons called "The New England Company;" and that the defendant published, concerning him, and concerning his said employment by the said company, and concerning him in his said trade of carpenter, builder, and surveyor, &c., in a letter to one J. G., he the said J. G. then and there being the treasurer of the said company, a certain libel, &c. It appeared, that the company in question was a corporation, and that its name was "The Society for the Propagation of the Gospel in New England and parts adjacent, in America."—Held, that this misdescription of the company was not, under the circumstances, any ground of nonsuit. *Rutherford v. Evans.* 74
4. It is no objection, that a part only of one sentence in a letter is inserted in a count for libel, if it appear that enough is set out to comprise the substance of the charge made by the defendant against the plaintiff. *Ib.*
5. In an action of slander, the plaintiff, in showing special damage, must confine his proof to the evidence of persons who received the slanderous statements from the defendant himself. *Ib.*
6. In an information for a libel, imputing improper conduct to A. as Town-clerk of H., it was alleged that he was Town-clerk, and that it was his duty to issue his precept for summoning the Grand Jury. The precept was signed both by the Mayor and Town-clerk:—Held, that this satisfied the allegation, that he issued his precept, and that the fact that he was an Alderman of the Borough at the time when he was elected Town-clerk, made no difference. *Rex v. Hatfield.* 244
7. Though a letter, written confidentially by the correspondents of a foreign mercantile house, contain very strong expressions concerning third persons engaged in mercantile transactions, imputing to such persons "notoriety for everything but fair dealing, and a strict adherence to their engagements:" yet,

- semble, that those expressions will not, per se, take away the privilege which attaches to such a communication, and make the letter a libel. *Ward v. Smith*. 302
2. The Court of King's Bench will not grant a *habeas corpus* to discharge out of custody a person who has been convicted of libel, at the commission of *oyer and terminer*, at the Old Bailey, on the ground that when the verdict was returned only one Commissioner was present instead of two, as required by law. But *quære*, whether such a circumstance may not be assigned as error. *Rees v. Carlile*. 415
- N. B.* It was afterwards held in *K. B.* that it could not.
3. If the surveyor to a society which publishes an account of the different classes of ships, for the information of merchants, underwriters, &c., is requested by a ship owner to survey his ship, and does so in consequence, and makes a report to the society, who class the vessel according to his report, such ship owner cannot maintain an action against the members of the society for a libel in misdescribing the ship; nor against the surveyor, unless he made a false report: and *quære*, whether such an action is maintainable at all without evidence of express malice? *Kerr v. Shelden*. 528
10. Form of declaration in the case of *Humphreys v. Miller*. 7

LIEN.

See BANKRUPT, 6. TROVER, 2, 3. LANDLORD AND TENANT, 7.

LIGHTS, ANCIENT.

See JUDGMENT RECOVERED, 1.

LIMITATIONS, STATUTE OF.

See ADMINISTRATOR, 1.

1. A payment of interest within six years by one of the makers of a joint and several promissory note more than six years old, will take the case out of the statute of limitations, as against the other maker of the note; and the statute 9 Geo. 4, c. 14, has not altered the law in this respect. An item of interest in an account of which the party paid the balance, is a sufficient payment of interest. *Chippendale v. Thurston*. 98
2. In *assumpsit* on a bill of exchange, to which the statute of limitations was pleaded, two letters were given in evidence to take the case out of the statute. They were written by the defendant to a third person; the first of them stated that he should be much obliged to the plaintiff to withdraw his out-lawry, and added, that as soon as his situation would allow, the plaintiff's claim, with others, should receive that attention that, as an honourable man, he considered them to deserve. The second letter expressed his readiness to do anything to satisfy the plaintiff and all his creditors. No evidence was given of any proceeding to outlawry having been taken with respect to the debt the plaintiff sought to recover. It was held, at *Nisi Prius* (the trial being since the 9 Geo. 4, c. 14), that, under these circumstances, the letters were not sufficiently connected with that debt to entitle the plaintiff to a verdict, and he was nonsuited; but leave was given

for a motion to set aside the nonsuit. On application afterwards to the Court of Common Pleas, the nonsuit was confirmed, a *rule nisi* for setting it aside being refused. *Fearn v. Lewis*. 173

3. A letter sent by a debtor to a creditor, respecting a debt, which contains, in the introductory part, these words, "*which is not to be used in prejudice of my rights now, or in any future arrangement that may be made or instituted*," cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the statute of limitations. *Cory v. Bretton*. 463
4. A., having become bankrupt in August, 1819, wrote, in November, 1826, a letter to B., in which he spoke of a debt of 98*l.* 15*s.*, due from him to B., and said, *inter alia*, as follows: "By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them."—Held, in *indebitatus assumpsit* by B. against A. for the sum mentioned, that the letter contained a sufficient promise to answer a plea of the statute of limitations, and a plea of bankruptcy; and also, that, to render the plea of bankruptcy applicable to the case, it must be shown that the debt existed prior to the bankruptcy. *Lang v. Mackenzie*. 463

LUNATIC.

A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody and confine him, unless he is satisfied, from those statements, that such a step is necessary, to prevent some immediate injury from being done by the individual, either to himself or to other persons; and, if access cannot be had for the purpose of examination, application should be made to the Lord Chancellor, that the party may be taken up under his authority. *Anderdon v. Burrows*. 210

MALICIOUS ARREST.

In an action for arresting a party and holding him to bail, without reasonable or probable cause; whatever was admissible in evidence to defeat the action on which the arrest took place is also admissible on the question of the right of the party arrested to recover for the injury sustained. *Haddon v. Mills*. 466

MALICIOUS INJURIES.

See ANSON. BOAT. POISONING. POISONING CATTLE. THRESHING-MACHINE. TRESPASS.

MALICIOUS PROSECUTION.

A., the servant of B., stated before a magistrate, that C. came into the yard of his employer, and took from a stable there two geldings, the property of B., and rode them away, though he was told that he must not:—Held, that this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having *feloniously stolen and ridden away* with two geldings. *Milton v. Elmore*. 456

MALICIOUS TRESPASS.

See TRESPASS.

MANSLAUGHTER.

See CORONER. EVIDENCE, 4, 17.

1. A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or gross inattention to his patient's safety. *Rez v. Long.* 398
2. On an indictment for manslaughter, where the death is occasioned by the application of a lotion to the skin, evidence may be given of the effect of the lotion when applied to other patients. *Id.*
3. Where a person, undertaking the cure of a disease (whether he has received a medical education or not), is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter. *Rez v. Long.* 423

MASTER AND SERVANT.

See APOTHECARY, 1, 2, 4, 5. INFANT, 2, 3, 4, 5.

1. If a servant has left his service for a considerable time, the presumption is, that all his wages have been paid. It seems that a master is not bound to provide a menial servant with medical attendance and medicines during sickness; but if a servant fall ill, and the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master and servant that he should do so. *Sellen v. Norman.* 80
2. A clerk and traveller, hired by the year, assaulted his employer's maid servant, with intent to ravish her. Held to be good cause for his dismissal without any notice. *Atkin v. Acton.* 208
3. *Seemle*, that a person dismissed under such circumstances is not entitled to wages even for the time during which he has served. *Id.*
4. To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. *Callo v. Brouncker.* 518

MONEY HAD AND RECEIVED.

See APOTHECARY, 1. ATTORNEY, 4.

See *Regula Generalis.*

607

MONEY LENT.

See INTEREST, 1.

See *Regula Generalis.*

607

MONEY PAID.

See *Regula Generalis.*

607

MURDER.

See CONCEALMENT OF BIRTH, 1. EVIDENCE, 4.

A person who was told by the surgeon that she would never recover, said, that she "hoped he would do what he could for her, for the sake of her family." He again told her that there was no chance of her recovery;—Held, that this showed such a degree of hope in her mind, as to render a statement she then made inadmissible as a declaration in articulo mortis. *Rez v. Crockett.* 544

MURDER. ABROAD.

1. In an indictment for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his Majesty. To prove the allegation that the prisoner was a subject of his Majesty, his own declaration is evidence to go to the Jury, and it will be for them to say, whether they are satisfied that he is in fact a British born subject. *Rez v. Halam.* 394
2. A bill of indictment for this offence ought not to state it to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-bow, &c.," and it being so stated, the Court directed the London venue to be stricken out before the bill was found by the Grand Jury. *Id.*

NEGLIGENCE.

1. If, in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appear that the accident happened from circumstances which persons of competent skill could not guard against; the plaintiff will not be entitled to recover; nor will he, if his men had put his barge in such a place that persons using ordinary care would run against it; nor, if the accident could have been avoided, but for the negligence of the plaintiff's own men in not being on board his barge at a time when it was lying in a dangerous place. *Lack v. Seward.* 106
2. Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of such adjoining premises rested:—It was held, that the party giving the notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old. *Massey v. Goider.* 161
3. A tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it. *Daniels v. Porter.* 263
4. In an action for an injury to the person, occasioned by the negligent and careless placing of such flap, the declaration of one defendant, who has suffered judgment by

- default, cannot be used as evidence against the other defendants. *Id.*
3. A publican, who has a flap door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury by it. *Proctor v. Harris.* 337
6. In an action on the case against stage coach proprietors for an injury done by the mismanagement of the coach, whereby a person was struck by the luggage on the coach; the guard of the coach is not a competent witness for the defendants, without a release; but a release given by one of the defendants is sufficient. *Whitmore v. Waterhouse.* 383
7. *Semble*, that in such an action the proprietors and the coachman may be sued jointly. *Id.*
8. If the carriage of A. strike against the cart of B., and a person who sees it demand the address of the owner of the carriage, the address given by a person in the carriage is admissible in evidence; but a statement by the latter that any damage done will be paid for is not so. *Beamon v. Ellice.* 585
9. In an action for negligent driving, a plan, which is to be put into the hands of the witnesses, should merely show the street, the pavement, the turnings, corners, &c., and not the supposed position of the carriages; but, if it does so, the Judge will not allow it to be used. *Id.*
10. If one, being the owner of a shop and goods, allow A. to be at this shop, and, in his own name, to sell and dispose of the goods as he pleases, and a portion of these goods be destroyed by the negligent driving of the coachman of B. while the servant of A. is carrying them; A. has such a qualified property in these goods as will entitle him to maintain an action on the case against B. *Whittingham v. Macken.* 597
11. In an action for the negligent driving of the defendant's coach, the plaintiff gave evidence of the goods destroyed being in the possession of his servant. The witness who proved this was cross-examined with a view of showing the goods to be the property of P., and the defendant called witnesses to prove them the property of P.:—*Semble*, that P. may be called as a witness in reply to prove that the goods were not his. *Id.*

NON PROS.

See Regula Generales, No. 8. 603

NOTICE.

See TRUSTEES, 1.

PARTICULARS.

See Regula Generales, No. 6. 602

PARTNERS.

See BILL OF EXCHANGE, 7.

1. If A. and B., being partners, dissolve their partnership, and in the deed of dissolution it be stipulated that A. shall receive all debts due to the firm, and afterwards C., a debtor of the firm, accept a bill of exchange

drawn by B., for the amount of the debt due to the firm:—*Held*, that this stipulation in the deed of dissolution is no defence to an action by B. against C. on this bill of exchange. *Kang v. Smith.* 108

2. Either partner, after a dissolution of partnership, may receive debts due to the firm, notwithstanding such a stipulation in the deed of dissolution; and, after a dissolution of partnership, either partner may give a release to a debtor of the firm. *Id.*

PATENT.

1. A party took out a patent for an improved shearing machine, to shear woollen cloths, and claimed four things as his invention: one of them was, a proper substance to brush the cloth. In describing the machine in the specification, he directed plush to be used for this purpose, but he nowhere stated, that this was an essential part of his machine. Before the time of this party's invention, some kind of brush had been uniformly used, but it was subsequently ascertained, that, with this machine, no brush was necessary:—*Held*, that this did not invalidate the patent. *Lewis v. Marling.* 52
2. Before a party took out a patent for a machine, a model of a similar machine was made, unknown to him, and a machine was begun to be made from it, but no similar machine was ever used in this country, before the patent:—*Held*, that this was not sufficient to defeat the patent. *Id.*

PAYMENT.

See INFANT, 2, 4, 5. MASTER AND SERVANT, 1.

PERJURY.

Perjury was assigned on an answer in chancery to a bill before it was amended:—*Held*, that to support the allegations respecting the bill, it was sufficient to put in the amended bill, and prove that the amendments were in the handwriting of a clerk in the Six Clerks' office, whose duty it would be to make them; but that it was not necessary to call the person who wrote the amendments. *Rees v. Laycock.* 326

PIGEONS.

See LARCENY, 1.

PLAN.

See NEGLIGENCE, 9.

PLEA PUIS DARREIN CONTINUANCE.

See LANDLORD AND TENANT, 9.

A plea *puis darrein continuance* stated, that, since the last continuance, the plaintiff had recovered a judgment for the same cause of action. The affidavit to verify this plea stated the time at which the judgment was recovered, which, by reference to the *Nisi Prius* record, appeared to be not since the last continuance:—*Held*, that this affidavit did not verify the plea, and that the plea could not be received. *Minshall v. Benson.* 635

PLEADING.

See **BANKRUPT**, 6, 13. **BILL OF EXCHANGE**, 9, 10. **INDICTMENT**. **SHIPPING**, 3. **STAMP**, 2. **VARIANCE**.

Forms of.—See **BANKRUPT**, 15. **BILL OF EXCHANGE**, 12. **ENRESELEMENT BY AGENTS**, 3. **INSOLVENT**, 10. **SHIPPING**, 9. **TREASURY**, 4. **WATER COMPANY**, 2.

See also *Regula Generales*, 602, 604, 607.

POISONING.

1. If a servant put poison into a coffee-pot which contains coffee, and, when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee—This is a "causing the poison to be taken," within the stat. 9 Geo. 4, c. 31, s. 11, and the servant is therefore indictable under that act. *Semble*, that this is also an "administering," within that act; as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party. *Res v. Harley*. 369
2. A prisoner was indicted for mixing sponge with milk, and administering it with intent to poison. The indictment was held insufficient, because it did not aver that the sponge was of a deleterious or poisonous nature. *Res v. Powles*. 571

POISONING CATTLE.

1. On an indictment for administering sulphuric acid to eight horses, with intent to kill them, the prosecutor may give evidence of administering, at different times, to show the intent; but if the Jury are satisfied that the prisoner administered the poison under an idea that it would improve the appearance of the horses, they ought to acquit him. *Res v. Mogg*. 364
2. If a prisoner mix poison with the corn intended for the feed of eight horses, and then gives each horse his feed from this mixture, an indictment, charging that he did administer the poison to the eight horses, is correct. *Id.*

POLICE.

See **ASSAULT**, 3.

POOR.

See **ASSAULT**, 1.

POST OFFICE.

1. A person employed at a receiving-house of the General Post-Office, to clean boots, &c., and to assist in tying up the letter-bag, is not a servant of the post-office, within the stat. 52 Geo. 3, c. 143, s. 2. *Res v. Pearson*. 572
2. A receiving-house is not a *post-office* within that statute, but it is "a place for the receipt of letters;" and the whole shop is to be considered as the "place for the receipt of letters," and not the mere letter-box; and therefore, if a person take a letter and put it on the shop counter of the receiving-house, or give it to one of the persons belonging to the shop there, that is putting the letter into the post. *Id.*

3. In an indictment on this stat. it was alleged, that a letter was "to be delivered at T." The letter was addressed "T. House," which was a house in the parish of T.—Held, sufficient. *Id.*
4. To constitute the offence of stealing a letter from a place for the receipt of letters under sect. 3 of this act, it is essential that the letter should be carried out of the shop which was the place for the receipt of letters; and, therefore, if a person take a letter and steal its contents, without taking the letter out of the shop, that is not an offence within this section of the act of Parliament. *Id.*

PRACTICE.

See **EJECTMENT**. **PLEA PUTE DARRIN CONTINUANCE**. **WITNESS**, 3, 4, 5, 9.

1. Where two defendants appear, and plead by one attorney, but, at the trial, counsel appear only for one defendant, and the other defendant appears in person, the counsel only will be allowed to address the Jury, but the defendant, who has no counsel, may cross-examine the witnesses. *Fering v. Tucker*. 70
2. **Replevin**—A writ for rent in arrear. Plea, that the tenant had let other property to the defendant, at a larger rent, and that it was agreed that the two rents should be set off against each other; and that, in consequence, a larger sum was due to the tenant than the sum distrained for by the defendant. Replication, denying this agreement.—Held, that, on these pleadings, the plaintiff was entitled to begin. *Curtis v. Wheeler*. 196
3. In replevin there was a cognisance for rent in arrear. To this there were two pleas, the one stating that a certain agreement had been entered into between the landlord and tenant, and that the tenant was subsequently induced by the landlord to enter into another agreement; which second agreement was the demise in the cognisance mentioned; and that this latter agreement had been abandoned by mutual consent before any rent became due. The other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud. Replication to the one, denying the abandonment; and to the other, denying the fraud.—Held, that, on these pleadings, the plaintiff had the right to begin. *Williams v. Thomas*. 234
4. If the trial of a prisoner indicted for felony be postponed, on the ground of the absence of the prosecutor, who is a material witness for the prosecution, the prisoner will not be allowed his costs, but the Judge will discharge him on his own recognisance. *Res v. Crowe*. 251
5. If the Jury cannot agree, the Judge at Nisi Prius has authority to discharge them. *Cook v. Caldwell*. 315
6. Where, on the trial of an issue out of the Court of Chancery, a person who is not a party on the record is, by order of that Court, "to be at liberty to attend the trial of such issue;" the counsel of such person has no right to address the Jury, or to call witnesses; but he may cross-examine the witnesses called by both parties, and suggest points of law. *Wright v. Wright*. 309
7. *Semble*, that if a person be tried at the Assizes, on an indictment removed by certiorari,

- the Judge would, under very special circumstances, receive affidavits in mitigation, before he proceeded to pass sentence, under the stat. 1 W. 4, c. 70, s. 9, but not in ordinary cases. *Rex v. Cox.* 538
8. In opening a case of felony the counsel for the prosecution ought not to state any particular expressions supposed to have been used by the prisoner, nor the precise words of any confession, but he may state the general effect of what the prisoner said. *Rex v. Swatkins.* 548
9. If a Court of equity directs an action of trover to be brought, and orders that the defendant shall admit the finding and the conversion of the goods. This does not give the defendant the right to begin. *Turner-ville v. Patrick.* 557
- See Regula Generales.* 601, 607, 615

PRINCIPAL AND AGENT.

A traveller who receives orders for goods from his employer's customer in the country, is authorized to receive payment for them in money, but not in other goods. *Howard v. Chapman.* 508

PRIZE-FIGHT.

Persons who are present at a prize-fight, and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants; and it is not at all material which of the combatants struck the first blow. *Rex v. Perkins.* 537

PROBATE DUTY.

On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator, which are either desperate or doubtful; and the executor has a right to exercise his judgment fairly and *bona fide*, whether a debt is doubtful or bad. *Mossa v. Cramer.* 524

PROMOTIONS, 86, 307, 357, 600.

RAPE.

Since the stat. 9 Geo. 4, c. 31, the offence of rape is made out by proof of penetration only; and in such case a prisoner must be found guilty, although there was no emission, and although he did not withdraw himself merely because he was satisfied. *Rex v. Jennings.* 249

RECEIVING STOLEN PROPERTY.

1. A. and B. were indicted: A. for stealing six bank notes of 100l. each, and B. for receiving "the said notes," knowing them to have been stolen. A. stole the six 100l. notes, and got them changed into 20l. notes, some of which B. received. Held, that B. could not be convicted on this indictment. *Rex v. Walkley.* 132
2. If an indictment against a receiver state the principal felony to have been committed by A. B., whatever would have been evidence of the principal felony to convict A. B., is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if A. B. confessed the principal

felony, that confession is admissible on the trial of the receiver, to prove the commission of the principal felony. *Rex v. Black.* 377

REGISTER.

See EVIDENCE, 2, 13.

RELEASE.

See LIBLEL, 2. NEGLIGENCE, 7.

REPLEVIN.

See PRACTICE, 2, 3. PROBATE DUTI.

RESPONDENTIA BOND.

See SHIPPING, 3.

REVERSIONER.

See JUDGMENT RECOVERED, 1.

RIOT.

See PRIZE-FIGHT.

1. It is not a "beginning to demolish" a house within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 8, unless the Jury be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into full effect, they would, in point of fact, have demolished it. *Rex v. Thomas.* 237
2. Twelve persons were indicted for a riot and assaulting J. W. The indictment did not conclude in *terrorum populi*. Several of the defendants had been convicted, and, at an ensuing assize, at which the remaining defendants were tried, there was evidence that they had joined in the riot, but there was no proof of any assault, except the words "po. se." and "guilty," written on the indictment, over the names of the convicted defendants:—Held, that this was no proof of an assault as against the present defendants, and that the present defendants could not be convicted of the riot only, as the indictment did not conclude in *terrorum populi*. *Rex v. Hughes.* 373
3. If, in reading the proclamation from the riot act, the magistrate omit to read the words "God save the King," at the end of it, persons remaining together for an hour after such reading of the proclamation cannot be capitally convicted under sect. 1 of that act. *Rex v. Child.* 442
4. If persons be charged with a riot and cutting down fences, and the indictment do not conclude in *terrorum populi*, they cannot, on that indictment, be convicted of a riot, but may be convicted of an unlawful assembly. *Rex v. Cox.* 538

ROBBERY.

1. On an indictment for robbery, the declaration in *articulo mortis* of the party robbed is not admissible in evidence. *Rex v. Lloyd.* 233
2. If persons who had formed part of a mob, obtain money from a party by advising him to give money to the mob, and be indicted for this as a robbery—The prosecutor, to show that this was not *bona fide* advice, may give evidence of demands of money made

by the same mob at other places before and afterwards in the course of the same day, if any of the prisoners were present on those occasions. *Rex v. Winkworth*. 444

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

See BANKRUPT, 13.

SHEEP-STEARING.

1. If on an indictment for stealing "one sheep," it appears that the animal stolen was under a year old, the prisoner must be acquitted, as he ought to have been indicted for stealing "one lamb." *Rex v. Birks*. 216
2. If a ewe is stolen, it must be so called in the indictment; and so a lamb must be called a lamb; and the term sheep is proper only where the animal stolen is a wether. *Id.*

SHERIFF.

See LANDLORD AND TENANT, 9, 10.

SHIP.

See BOAT.

SHIPPING.

See LABEL, 2.

1. If A. has goods consigned to him, and there be on board the same ship goods consigned to other consignees, and these goods are so placed on board, that A., after the ship arrives, cannot obtain his goods within the time limited by the bill of lading, A. is not liable for demurrage. *Robson v. Brown*. 112
2. In an action against one of the owners for work done to a vessel, by the order of the ship's husband, such owner will be liable, unless it be shown, that the dealing was, that the person who directed the work to be done should be looked to exclusively. *Thompson v. Finden*. 158
3. In debt on a bond, purporting to be for a loan on respondentia on an East India ship, to which two sets of special pleas were pleaded, one not alleging usury, and the other illegality under the statute 19 Geo. 2, c. 37, s. 5, it was left to the Jury to say whether it was a bona fide transaction on respondentia, or a loan on usury.—Held, on motion for a new trial, the Jury having found for the plaintiff, that the question was sufficiently left to the Jury, and that it was not necessary, notwithstanding the provisions of the 19 Geo. 2, to leave it as a distinct question for them to say, whether the money was or was not lent to a person who had no interest in or goods on board the vessel.—*Semble*, that pleas of illegality under the above statute should contain an allegation that the money borrowed was not intended to be laid out in the purchase of goods to be put on board the vessel. *Wynne v. Crockett*. 178
4. The captain of an insured ship, which has been injured by perils of the sea, is not justified in selling the ship instead of repairing it, unless he either has not the means of getting the repairs done at the place where the vessel is obliged to put in; or cannot get them done, except at such an expense as would render it undoubtedly improper to repair, if the ship were not insured; or has not money in his possession, sufficient to pay for the repairs, nor is in a situation to raise it by loan or otherwise, except at such an extravagant rate as would prevent a prudent man, in the exercise of a sound and vigorous judgment, from undertaking the repairs under such circumstances. *Somers v. Sugrue*. 225
5. Where a broker is employed by a ship-owner to procure a charter-party, if the negotiation goes off on account of any fault in the broker, he is not entitled to recover anything in the shape of remuneration, nor is he, in such case, entitled to recover for any expenses which he may have been put to, unless such expenses are unusual, and have been incurred in consequence of the ship owners having urged him to extraordinary expedition in the matter. And *semble*, that where the negotiation is not carried into effect, but there is no fault in the broker, he is not entitled to anything, unless the charter-party is actually signed. *Dalton v. Irwin*. 229
6. A captain of a ship is not justified in throwing a stone at a person in a boat, who has fastened it to the ship, and thereby impeded and endangered it, for the purpose of making him let go, unless it was not possible either at the time or before the immediate pinch of the danger, to adopt any other mode for the purpose. *Eggs v. Norcross*. 408
7. *Semble*, that there is not any custom in London by which a ship-owner is bound to pay commission to a broker who obtains the signature of a merchant to an order, signed by such owner, consisting of a paper partly printed and partly written, referring to the principal rate of freight, but containing the words "subject to the usual clauses in this trade," although a charter-party be prepared, which would have been executed but for the refusal of the owner to undertake the voyage. Nor in such case is the broker entitled to recover any remuneration for his work and labour. *Broad v. Thomas*. 338
8. The master and part owner of a ship, compelled by stress of weather to put into a certain port on a voyage, incurred debts there in respect of the ship, for which he was arrested. Upon this, he sent to the ship agents the certificate of registry, accompanied by a letter, in which he stated that he lodged it with them as a security for the payment of all demands and charges on account of the vessel since she had been in the port, adding that he hoped it would be satisfactory to them. The agents received the register but did not pay the demands, nor would they return the register to the master.—Held, that the receipt of the register, on the terms in the letter, did not create any implied contract on the part of the agents to pay the demands, but that the terms of the letter rather evidenced a promise on the part of the master that the ship should not leave the port till those demands were satisfied. *Bowen v. Fox*. 453
9. Where the cause of complaint, in an action on a charter-party by the freighters against the owner of a vessel, was, that a full cargo was not taken in, in consequence of arrange-

ments in the stowage varying from those contemplated by the charter-party—it was held, that the plaintiffs were not entitled to recover, as it appeared that one of them and the broker, who managed the business, were present from time to time during the loading, and cognisant of the arrangements, but did not make any objection. *Hovill v. Stephenson*. 469

10. Form of plea in the case of *Eyre v. Norworthy*. 503

SLANDER.

See LIEBEL.

1. In an action of slander, where three witnesses were called for the plaintiff, the evidence of two of whom was quite inconsistent with the notion of a confidential communication, it was held, that it was not a misdirection in the Judge, to leave it to the Jury to say, whether or no they believed the communication to be confidential; and that it was not necessary in such a case for him to tell them, in distinct terms, that, if they believed the evidence, they must find their verdict for the plaintiff. *Pictou v. Jackman*. 257
2. The declaration in slander stated, that the defendant, intending to injure the plaintiff in the opinion of certain persons, who had been in the habit of employing him as a fruit broker, represented to those persons that the plaintiff had prejudiced the sale of a cargo of oranges belonging to them, by reporting, in the sale room, that *he* (the plaintiff) had three or four ships laden with fruit between Gravesend and London. The proof at the trial was, that the plaintiff had said, that *there* were three or four ships laden, &c. This was held, at *Nisi Prius*, to be a fatal variance; and the plaintiff was nonsuited, and the nonsuit was confirmed in the Court above, a rule for setting it aside being refused. *Wood v. Adam*. 268

SPIRITS.

If a person sell *two sorts* of spirits at the same time, to an amount above 20s., he may recover the price, although the amount of each species of spirits be under 20s. *Owens v. Porter*. 367

STABBING.

See WOUNDING.

STAGE COACH.

See NEGLIGENCE.

STAMP.

See AGREEMENT, 1. WATER-COMPANY, 1:

1. A receipt in the following form: "Received of W. C. the sum of 9l. in full for what I done for him," is not a receipt in full of all demands, so as to require a 10s. stamp. *Law v. Gushy*. 149
2. A. having goods at the wharf of B., which C. had conveyed there by ship, gave B. a paper, by which he authorized him to sell the goods, and out of the proceeds to pay C. the balance due to him for freight, mentioning the sum; B. sold the goods, and received the proceeds:—Held, in *assumpsit* by C. against B. for the sum mentioned in the paper, that the paper nei-

ther required a stamp, nor ought to have been declared upon specially. *Humphreys v. Briant*. 157

3. A draft agreement had on the back of it the following memorandum:—"We approve of this draft." And this was signed by the parties:—Held, that it did not require any stamp. *Doe d. Lambourn v. Pedgrip*. 312
4. Three persons in the same line of business had "agreed to divide, and not to interfere with certain districts of the several cities, boroughs, &c., set forth on Bowle's Post map of England and Wales, thereto annexed and referred to;" and that the three parties should respectively sell without interruption, in the several cities, &c., marked and set forth, and described in the said map, which was annexed to the agreement:—Held, that all the names of places on the map must be counted as words; and that, if the words of the agreement, with the names on the map, amounted to more than 1080, the agreement must be stamped accordingly with a 1l. 15s. stamp. *Wickens v. Evans*. 359
5. The proper stamp to be borne by a written instrument must depend on what is the leading character of such instrument. Therefore, where A., by deed, demised lands to B., and this deed contained a covenant by C. to pay the rent, and the deed bore a stamp of 1l. 10s., which was the proper stamp for it as a lease:—It was held, in an action of covenant against C., for non-payment of the rent, that this stamp was sufficient, and that the deed did not require a 1l. 15s. stamp. *Pratt v. Thomas*. 554
6. If an agreement, or other written instrument, be charged to be part of a fraud or other crime, it is immaterial whether it is stamped or not. *Ree v. Fowle*. 592

STOCK, REPLACING.

See ELECTION, 1.

SUBPŒNA:

See WITNESSES, 3, 5, 6.

See also General Rule. 615

SUMMONS:

See Regula Generales, No. 9. 609

SURGEON:

See APOTHECARY. MANSLAUGHTER.

TENDER.

See BANKRUPT, 13.

THEATRE:

If three persons be told on entering a theatre that there is room, when in fact there is not, their proper course is to leave the theatre, and demand the return of their money; and such persons are not justified in getting into a private box in the theatre, and, if they do, the proprietor may remove them, using no more force than is necessary—and if in going out of the theatre, one of them strike a servant of the proprietor's in the presence of a constable, such constable will be justified in taking all the three persons into custody, if the Jury shall be satisfied that they

were acting with a common purpose. *Lewis v. Arnold.* 354

THREATENING LETTER.

1. An anonymous letter stated, that the writer had overheard certain persons agree together to do an injury to the person or property of the prosecutor, to whom the letter was sent; and that if thirty sovereigns were laid in a particular place, the writer would give such information as would frustrate the attempt:—Held, that this was not a threatening letter within the stat. 7 & 8 Geo. 4, c. 29, s. 8, although it appeared that the letter was a mere device to defraud the prosecutor of thirty sovereigns. *Rex v. Pickford.* 227
2. A letter was signed "I am your Cut-throat," and stated, that if the person to whom it was sent had his deserts, he would not live the week out; and that the writer would be with him shortly, and if he made light of it, the writer would make light of him and his:—Held, that this letter so plainly conveyed a threat to kill and murder, as to render it unnecessary to insert either innuendoes or prefatory allegations in the indictment, to explain its meaning. *Rex v. Boucher.* 563

THRESHING MACHINES, DESTROYING.

1. If a person has had a threshing-machine taken to pieces, he expecting a mob to come and destroy it, and the mob come and destroy the different parts of the machine when thus separated—This is a felony within the stat. 7 & 8 Geo. 4, c. 30, s. 4. *Rex v. Mackerel.* 448
2. A. had a threshing-machine worked by water, the water-wheel having been put up for the sole purpose of working this machine, and never having been used for anything else. A., fearing the destruction of the machine by a mob, took it down, leaving the water-wheel standing. The prisoners broke the water-wheel:—Held, to be a felony, under the stat. 7 & 8 Geo. 4, c. 30, s. 4; and that the fact that A. sometimes worked the threshing-machine by horses, will make no difference. *Rex v. Fidler.* 449

TRAVELLER.

See PRINCIPAL AND AGENT, 1.

TRESPASS.

See DOG.

1. A person cannot recover damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action of trespass; and if he had such cause, the circumstance of there being a notice on a board in large letters, warning persons to beware of the dog, will not be an answer to an action by him for the injury, if it appear that he was not able to read. *Serck v. Blackburn.* 297
2. If no suspicion be thrown upon the plaintiff by the defendant, in such a case it may be taken that he had such cause, provided the dog is put in a place forming part of one

entrance to the house of the defendant, although there may be other entrances of a more public description, by which the plaintiff might have proceeded. *Id.*

3. A., a hawker, went to the house of B. to sell goods, and a dog of B. coming out of the house, A. knocked out one of its eyes, for which B.'s wife caused A. to be apprehended:—Held, that it was for the Jury to say, whether A. had struck the dog for his own preservation, and fairly to protect himself; or whether it was a wilful and malicious trespass on his part. To justify the apprehension of an offender under the malicious injuries act, 7 & 8 Geo. 4, c. 30, the offender must be taken in the fact, or on a quick pursuit. *Hawsey v. Boulbee.* 350
4. Form of justification under the stat. 7 & 8 Geo. 4, c. 30. 351

TRIAL.

See COSTS. PRACTICE, 4.

Application was made on the part of the plaintiff to have a cause taken out of its turn, in order that it might be tried during the existing Sittings, on the ground that the defendant had died since the commencement of such Sittings. The application was opposed on the part of the defendant's executors, and refused by the Chief Justice of the Common Pleas, after time taken to consider. *Issard v. Milner.* 285

TROVER.

See BILL OF EXCHANGE, 3, 5. PRACTICE, 9.

1. Two persons, jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate actions of trover in respect of it, against a person who unjustly detains it. *Bleaden v. Hancock.* 153
2. If a party claim a lien on plates for his bill for printing from them, in order to establish it, he must show a course of dealing so general and uniform, that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage. *Id.*
3. *Scilicet*, that there is no such usage, with respect to stereotype, and *quære* if there be with respect to copper-plate printing. *Id.*

USURY.

See SHIPPING, 3.

VARIANCE.

See AMENDMENT, 1, 2. BIGAMY. EMBEZZLEMENT BY AGENTS, 1. LIBEL, 3. MALICIOUS PROSECUTION, 2. SLANDER, 2. SHEEP-STEALING.

VENUE.

See INDICTMENT.

VESSEL.

See BOAT.

WARRANTY.

1. A. sold to B. for 95*l*. two pictures, representing them as "a couple of Pousin's." They were in fact, not originals, but very excellent copies; B. did not offer to return

them:—*Held*, that if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon; but that, as he kept them, he was liable to pay such sum as the jury might consider to be the value. *Lomi v. Tucker.* 15

2. The general rule is, that whatever a seller represents at the time of a sale is a warranty. A warranty may be either general or qualified. If a person, at the time of his selling a horse, say, "I never warrant, but he is sound as far as I know;" this is a qualified warranty, and the purchaser may maintain *assumpsit* upon it, if he can show that the horse was unsound to the knowledge of the seller. *Wood v. Smith.* 45

WATER COMPANY.

1. A. acted as the owner of premises, and made a contract with a water company to supply the premises with water at a certain height. In his absence, his men, to the injury of the company, fixed the pipe at a higher level. After it was done, A. knew of it. A. was not in fact the owner of the premises:—*Held*, that he was liable in an action on the case brought by the Company. A contract with a water company for the supplying of premises with water does not require a stamp. *The West Middlesex Water-Works Company v. Suckrope.* 87
2. Form of declaration. *Id. (n.)*

WITNESS.

See *INSOLVENT*, 1, 2. *LIBEL*, 1, 2. *NEGLECT*, 6.

1. In an action against the surety of a collector of rates, to recover sums received and not paid over by the collector, an inhabitant of the place is admissible *ex necessitate* to prove payments to the collector, although, in the event of the surety's failing to make good the deficiency, he would be liable to a fresh assessment. *Middleton v. Frost.* 16
2. A witness called for the defendant, stated, on the *voir dire*, that he was bail to the Sheriff in the action, but did not justify, and that he had not done anything to get the recognisance he had entered into discharged. He added, that other bail justified, but it appeared that he did not see them do so:—*Held*, that he was not a competent witness. *Hawkins v. Inwood.* 148
3. In a criminal case, a person, who is present in Court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpoenaed. An indictment for stopping a way is a criminal case for this purpose. *Rex v. Sadler.* 218
4. If counsel for the prosecution call a witness, whose name is on the back of the indictment, but do not examine him, and such witness be examined by the prisoner's counsel, any question put by the prosecutor's counsel after this must be considered as a re-examination, and therefore the prosecutor's counsel cannot ask anything that does not arise out of the previous examination by the prisoner's counsel. *Rex v. Beasley.* 220
5. Time for subpoenaing a witness domiciled

in London, to give evidence in a town cause. *Postan v. Rose.* 271

6. If a person having the custody of papers be subpoenaed to produce them on the trial of a cause, he may be called on to put them in, without being sworn as a witness. *Davis v. Dale.* 335
7. It is not essential that witnesses who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character and conduct, as enables them conscientiously to say that it is impossible to place any reliance on any statement that such person may make. *Rex v. Bispham.* 392
8. In an ejectment, a person who has had possession of the property is not a competent witness for the defendant, to prove that he (the witness) has held it for more than 20 years, because, if the lessor of the plaintiff recovered, the witness would be liable to an action for *meane profits*. *Dee d. Lewis v. Preece.* 556
9. The witnesses had been all ordered out of Court, but one of them came into Court again, and heard the evidence of another witness. The witness who had so come back into Court was allowed to be examined as to such facts only as had not been spoken to by any other witness. *Beamon v. Ellice.* 585

WORK AND MATERIALS.

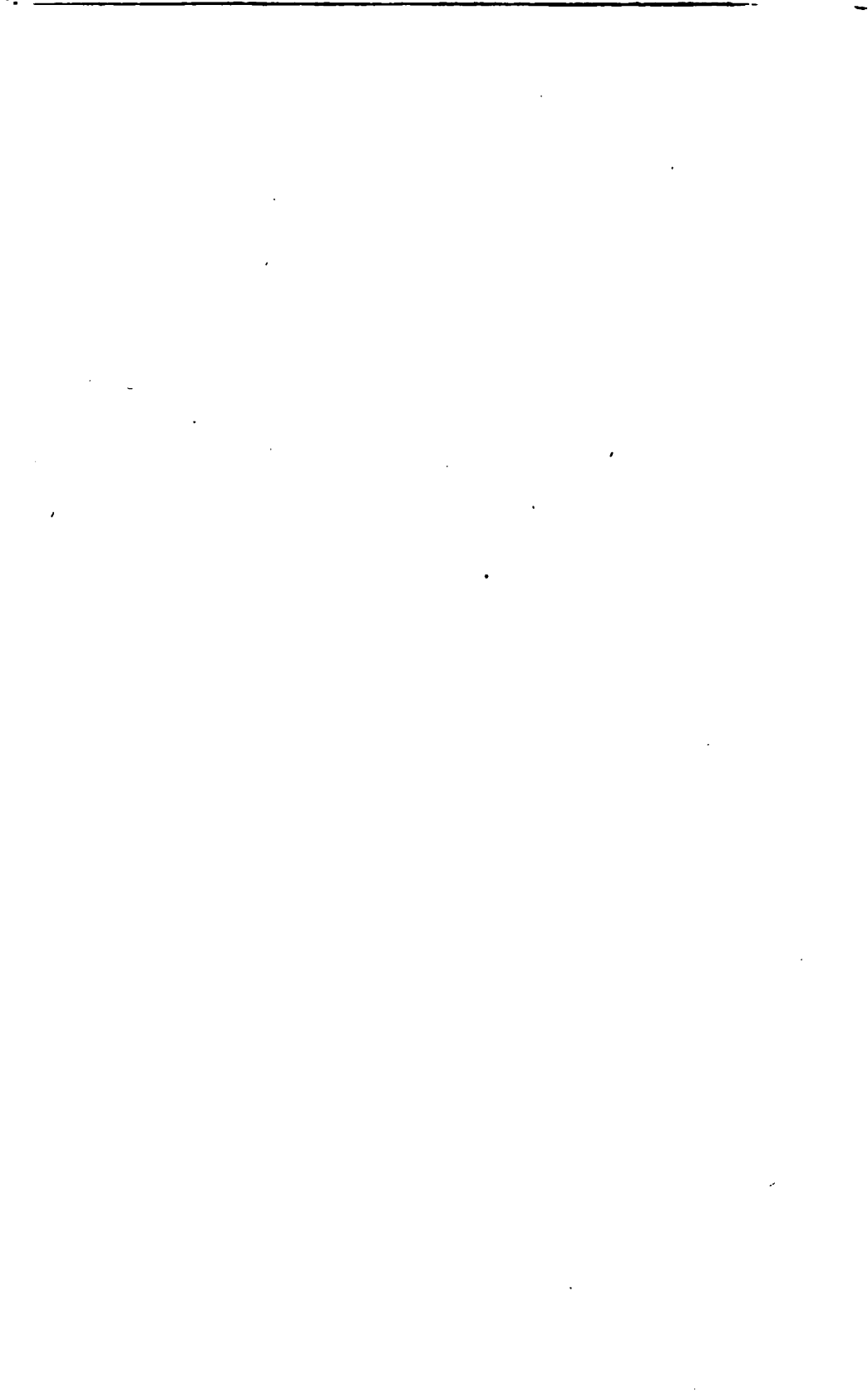
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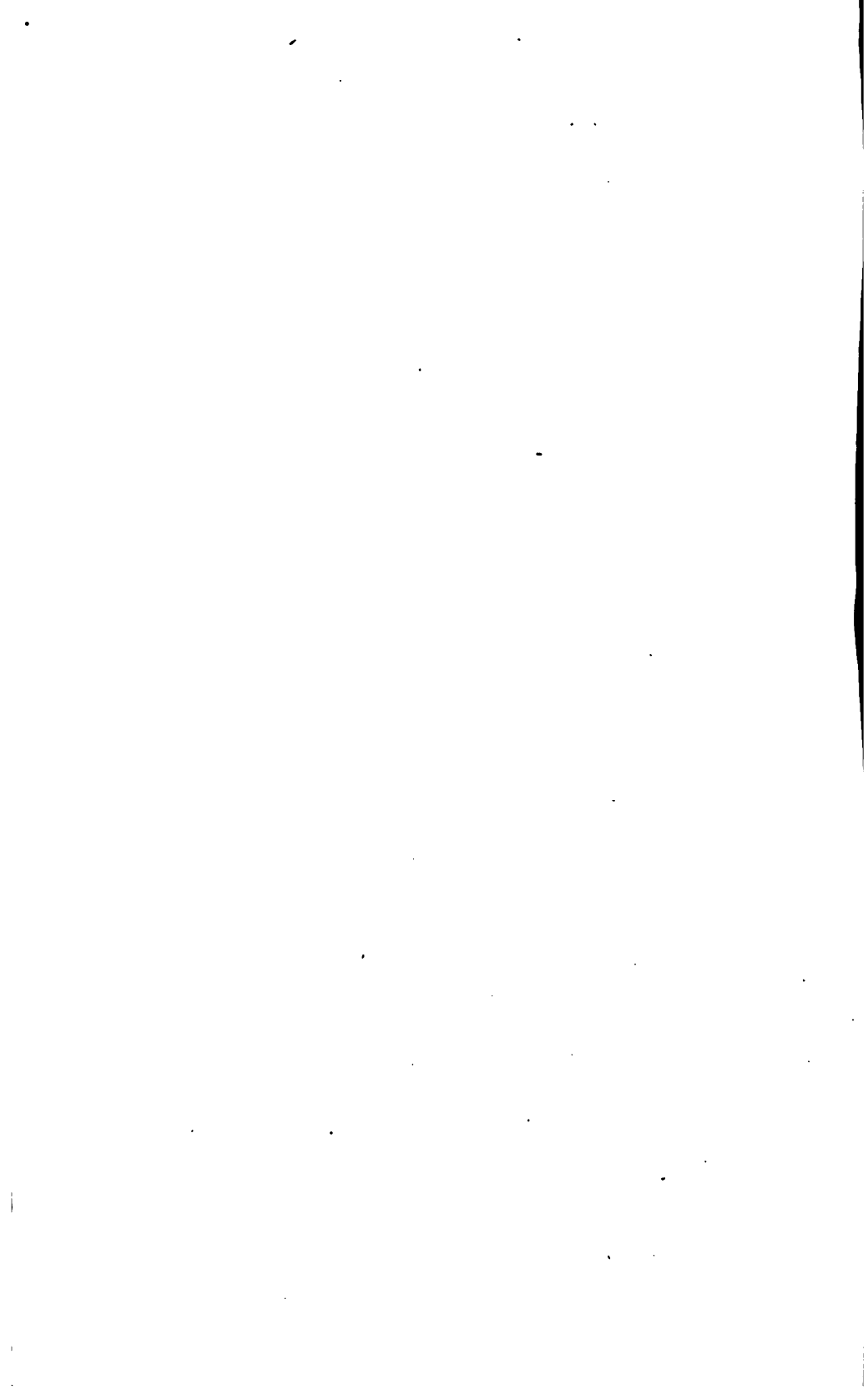
WOUNDING.

See *APPREHENSION*.

1. Breaking a person's collar bone, and bruising him, is not a wounding within the stat. 9 Geo. 4, c. 31, s. 12. *Rex v. Wood.* 381
2. Inflicting a wound on a person by throwing a sledge-hammer at him, is a wounding within the stat. 9 Geo. 4, c. 31, ss. 11, 12, although the sledge-hammer, from being blunt, was not an instrument calculated to inflict a wound. *Rex v. Withers.* 446
3. If a person strike another with a bludgeon, and break the skin and draw blood,—this is a sufficient wounding to be within the stat. 7 & 8 Geo. 4, c. 31, s. 11 & 12. Under that stat. it is not at all material what the instrument is, with which the party is wounded. *Rex v. Payne.* 558
4. Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending, as soon as they could get assistance, to secure them; one of the watchmen walked beside the prisoner, and the other watchman beside the other person, at some distance from the prisoner. The other person wounded the watchman who was near him:—*Held*, that the prisoner could not be convicted of this wounding, unless the Jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting, with extreme violence, any person who might attempt to apprehend them. *Rex v. Collison.* 565







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